10884

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1900~~ 1902.

No. ~~284~~ 86.

THE HOME FOR INCURABLES, PLAINTIFF IN ERROR

vs.

THE CITY OF NEW YORK.

N ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED APRIL 24, 1901

(18,131.)

(18,131.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 304.

THE HOME FOR INCURABLES, PLAINTIFF IN ERROR,

vs.

THE CITY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1901.

a Court of Appeals.

In the Matter of the Petition of THE HOME FOR INCURABLES to Vacate or Reduce an Assessment for a Sewer in East 184th Street from Vanderbilt Avenue West to Washington Avenue, Confirmed January 22, 1900.

Papers on Appeal.

Truman H. Baldwin, attorney for petitioner, appellant, 31 Liberty street, borough of Manhattan, New York city.

John Whalen, corporation counsel and attorney for respondent, 2 Tryon row, borough of Manhattan, New York city.

b Court of Appeals of New York, *ss.*

Pleas in the court of appeals, held at the capitol in the city of Albany on the 19th day of March in the year of our Lord one thousand nine hundred and one before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur, March 20th, 1901.

In the Matter of the Petition of THE HOME FOR INCURABLES to Vacate or Reduce an Assessment, &c., &c.

Be it remembered, that on the 28th day of January in the year of our Lord one thousand nine hundred and one, The Home for Incurables, petitioner, the appellant in this proceeding came here into the court of appeals by Truman H. Baldwin, its attorney, and filed in the said court, a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the first judicial department. And the City of New York, the respondent in said proceeding afterwards appeared in said court of appeals by John Whalen, corporation counsel, its attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereto annexed.

c Whereupon, the said court of appeals having heard this proceeding argued by Mr. John M. Perry, of counsel for the appellant and by Mr. Theodore Connoly, assistant corporation counsel, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is, affirmed with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be, and the same hereby is, affirmed, with costs, as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto

aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *March 20th*, 1901.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said proceeding in the court of appeals, with the papers originally filed therein, attached thereto.

[SEAL.] W. H. SHANKLAND, *Clerk.*

1 *Notice of Motion.*

Supreme Court, New York County.

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East One Hundred and Eighty-fourth Street from Vanderbilt Avenue West to Washington Avenue, Confirmed January 22, 1900.

SIR: You will please take notice that upon the annexed petition, the admission of service endorsed thereon and the agreed evidence and stipulation as to facts attached hereto, I shall move this court, at a special term thereof to be held at part 1 thereof, at the county court-house, in the borough of Manhattan and city of New York, on the 18th day of October, 1900, at 10.30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order granting the relief prayed for in said petition, and for such other and further relief as to the court shall seem just.

Dated New York, October 8, 1900.

TRUMAN H. BALDWIN,
Attorney for Petitioner, 31 *Liberty Street*,
Borough of Manhattan, New York City.

To John Whalen, Esq., counsel to the corporation.

2 *Petition.*

Supreme Court, City and County of New York.

In the Matter of the Petition of HOME FOR INCURABLES to Reduce Assessment for Sewer in East One Hundred and Eighty-fourth Street from Vanderbilt Avenue West to Washington Avenue, &c.

To the supreme court of the State of New York:

The petitioner in this matter, by Truman H. Baldwin, attorney, respectfully shows to this court and alleges:

That at the date of the confirmation of the above-entitled assess-

ment the above-named petitioner was and still is the owner of the lots hereinafter described, and your petitioner is the person aggrieved by said assessment thereon.

That on the 22d day of January, 1900, the assessment above entitled was confirmed by operation of law, and the title thereof was thereupon duly entered, with date of entry and date of confirmation, in the record of titles of assessments confirmed, and said assessment was thereby imposed and became a lien upon the lots described therein by the ward number one (1) in block number 3064 in the twenty-fourth ward of the city of New York.

3 Your petitioner further shows that said assessment is irregular, excessive and voidable for the following reasons, and alleges upon information and belief:

First. That the comptroller of the city of New York certified to the board of assessors the amount of interest at the rate of six per cent. per annum upon the several installments advanced or payments made on acount of said work, from the time of such payment or advance to a day sixty days after the date of his certificate, being, to a day two years after completion of said work assessed for in said assessment-list, and said interest has been included in the assessment herein and assessed upon petitioner's lots; but petitioner alleges that the mayor, aldermen and commonalty of the city of New York did not pay or expend said interest, but loaned its credit to borrow the money to pay for the prosecution of said work by the issue and sale of assessment bonds, which bonds bore a rate of interest not to exceed two and one-half per cent. per annum, and the assessment and collection of said interest will be an unlawful profit and gain made by the corporation of the city of New York for doing the work of said improvement. That said interest is in the nature of a penalty imposed upon petitioner for the non-payment of his proportion of the cost of said work for a period of time during which his just proportion had not been determined or apportioned nor any officer or agent of said corporation authorized or empowered to receive any sum of money from petitioner on account of said work, and during which he could not prevent the accruing or continuance of said penalty nor by any diligence prevent the imposition thereof, or relieve himself or his property therefrom.

That so much of the act of the legislature of the State of New York, known as section 868 of the New York city consolidation act of 1882, as purports to authorize and direct the making

4 of such interest certificate and the assessment of the amount thereof herein, is in violation of the consti-tion of the State of New York in that said portion of said act authorizes the taking of private property without just compensation, and said portion of said act purports to authorize an unlawful exercise of the power of taxation.

That pursuant to said act it was made the duty of said comptroller forthwith upon the completion of said work to have certified to the said board of assessors the amount of such interest to a day sixty days after the date of such certificate, but that said comptroller neglected to make such certificate until long after the completion of

said work and then said comptroller made his certificate that said interest calculated at the rate of six per cent. per annum to the said 4th day of February, 1899, was the sum of $7,837.33, a sum greater by $6,500.00 than said interest would have amounted to, had said interest certificate been made pursuant to said act.

That said interest forms no part of the cost of the said improvement.

Wherefore, your petitioner prays that said assessment may be vacated or reduced, and that the lien or liens created thereby, or by any subsequent proceeding, may be canceled and discharged or reduced, so far as the same affect said lots, and that the comptroller of the city of New York, and the collector of assessments and clerk of arrears may be directed to cancel and discharge or reduce said assessment, and the said lien or liens upon the records of their respective offices, so far as the same affect the lots aforesaid.

Dated February 8, 1900.

TRUMAN H. BALDWIN,
Attorney for Petitioner, 31 Liberty Street, New York.

5 *Examination of Claimant.*

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East One Hundred and Eighty-fourth Street from Vanderbilt Avenue West to Washington Avenue, Confirmed January 22, 1900.

NEW YORK, *June* 11, 1900.

The following testimony was taken in the proceeding entitled as above, at the office of the corporation counsel, subject to any objection that might be raised hereafter.

Appearances.

For the petitioner, Truman H. Baldwin, Esq.
For the city, George L. Sterling, Esq.

Counsel for petitioner introduces in evidence deed of A. P. Man and other trustees to the Home for Incurables, dated May 25, 1872, recorded in Westchester county, register's office, Liber 809 of Deeds, page 387, June 13, 1872.

Counsel for the petitioner states that this deed covers the property mentioned in the petition, to wit: Ward No. 1, block No. 3064.

Counsel for petitioner also introduces in evidence assessment-list for the improvement entitled as above, which was confirmed on January 22, 1900.

6 It appears from the list that the amount of the assessment was $74,349.94. It is made up as follows:

Contract	$58,960 08
Less excess of inspection	120 00
	$58,840 08

Expenses connected therewith:

Surveying	$5,380 53	
Inspecting	2,280 00	
Interest	7,837 33	
Binding assessment	12 00	
		15,509 86
		$74,349 94

The interest certificate of the comptroller is dated December 6, 1898, and the certificate of final completion is verified February 2, 1897.

It appears from the list that among the amount of assessments is the following.

Map No. 404, block No. 3064, ward No. 1. Home for Incurables	$4,657 28

Counsel for petitioner also introduces in evidence the contract for this improvement, which was made with William F. Norton and William Dalton, composing the firm of Norton & Dalton, dated January 9, 1896, and filed January 13, 1896. The payments were made upon this contract as follows:

1896.	
May 2d	$3,170 12
May 29th	5,599 65
July 8th	8,817 83
August 18th	6,395 02
September 26th	4,875 33
October 22d	3,839 67
December 11th	4,334 93
7	
1897.	
January 14th	$1,522 72
March 11th	16,519 95
December 2d	3,741 86
Total	$58,818 08
For repairs	22 00
	$58,840 08

Stipulated Facts.

The following facts are stipulated and agreed:

It appears from the books kept in the office of the comptroller of the city of New York that all payments which were made by the city on account of the above-entitled improvement were made from a fund which is designated "the street improvement fund."

During the year 1896 that fund amounted to $3,931,459.39. Of

that sum $2,131,459.39 consisted of moneys which were collected by the city from property-owners for assessments for local improvements confirmed during or previous to the year ending December 31, 1896, and $1,800,000 thereof consisted of amount realized from sale of bonds issued pursuant to sections 144 and 150 of the New York consolidation act, which bonds bore interest at the rate of three per cent. per annum, and which were sold at par.

During the year 1897 the said street improvement fund amounted to $2,919,062.48, of which $1,969,062.48 was collected from property-owners for assessments levied during or prior to the year ending December 31, 1897, and $950,000 was realized on the sale of assessment bonds pursuant to sections 144 and 150 of the New York city consolidation act, which bonds bore interest at the rate of three per cent., and were sold at par.

There is nothing in the books of the city to show whether
8 the specific sums which were used to make payment on the contract in question were derived from moneys paid into the fund on account of assessments collected, or from moneys realized from bond sales.

The interest included in the gross amount of this assessment ($7,837.33) is interest at the rate of six per cent. upon the several payments made to the contractors on account of this work, and is included in the total cost of the work pursuant to the provisions of section 868 of the consolidation act (re-enacted as sec. 946 of the charter).

Order Denying Motion.

At a special term, part I., of the supreme court, held at the county court-house in said county on the 19th day of November, 1900.

Present: Hon. John J. Freedman, justice.

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East One Hundred and Eighty-fourth Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22, 1900.

The above-named petitioner, The Home for Incurables, having moved for an order granting the relief prayed for in its peti-
9 tion, and for such other and further relief as to the court shall seem just, now, upon reading and filing the notice of motion, dated the 8th day of October, 1900; the petition of Truman H. Baldwin, dated the 8th day of February, 1900; the examination of claimant taken June 11th, 1900, and the stipulation as to facts, and after hearing Truman H. Baldwin, Esq., counsel for the petitioner, in support of said motion, and George L. Sterling, Esq., assistant corporation counsel, in opposition thereto,

Upon motion of John Whalen, corporation counsel, it is

Ordered, that the said motion be and the same hereby is denied with ten ($10) dollars costs to the city of New York.

Enter.

J. J. F., *J. S. C.*

10 Supreme Court, New York County.

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East One Hundred and Eighty-fourth Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22, 1900.

SIRS: You will please take notice that The Home for Incurables, the petitioner herein, hereby appeals to the appellate division of the supreme court, first department, from the order of Justice Freedman, entered on the 19th day of November, 1900, and from each and every part of said order.

Dated New York, November 20, 1900.

Yours, &c., TRUMAN H. BALDWIN,
Att'y for Petitioner, 31 Liberty Street, New York City.

To John Whalen, Esqre., corporation counsel; William Sohmer, Esqre., county clerk.

11 *Waiver of Certification.*

Supreme Court, New York County.

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East One Hundred and Eighty-fourth Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22, 1900.

It is hereby stipulated that the foregoing printed papers constitute and are true copies of the original order, notice of appeal, and motion papers used in the court below and of the whole thereof.

Dated New York, November 28, 1900.

TRUMAN H. BALDWIN,
Attorney for Petitioner.
JOHN WHALEN,
Corporation Counsel.

12 *Affidavit of No Opinion.*

Supreme Court, New York County.

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East One Hundred and Eighty-fourth Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22, 1900.

COUNTY OF NEW YORK, *ss:*

John M. Perry, being duly sworn, says:

I am counsel for The Home for Incurables, the petitioner herein. No opinion was given by Justice Freedman in denying the motion to reduce the assessment herein.

JNO. M. PERRY.

Sworn to before me this 20th day of November, 1900.
SIDNEY CURTIS,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

13 *Order of Affirmance.*

At a term of the appellate division of the supreme court, in and for the first department, held at the court-house thereof in the county of New York, on the 21st day of December, 1900.

Present: Hon. Charles H. Van Brunt, P. J., Hon. William Rumsey, Hon. Edward Patterson, Hon. Morgan J. O'Brien, Hon. Chester B. McLaughlin, JJ.

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East 184th Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22nd, 1900.

The above-named petitioner, The Home for Incurables, having appealed to the appellate division of the supreme court, first department, from the order entered herein in the office of the clerk of the county of New York on the 19th day of November, 1900, and the said appeal having come duly on to be heard, now, after hearing Truman H. Baldwin, Esq., of counsel for the petitioner, in support of said appeal, and George L. Sterling, Esq., assistant
14 corporation counsel, in opposition thereto, and due deliberation having been had, upon motion of John Whalen, corporation counsel, it is unanimously

Ordered, that the said order so appealed from as aforesaid be and the same hereby is affirmed with ten dollars costs and disbursements to the city of New York.

Notice of Appeal.

Supreme Court, Appellate Division, First Department.

In the Matter of the Petition of THE HOME FOR INCURABLES to Vacate or Reduce an Assessment for a Sewer in East 184th Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22nd, 1900.

SIRS: You will please take notice that the above-named petitioner hereby appeals to the court of appeals from the order of this court entered January 4th, 1901, which affirmed an order entered
15 herein on the 19th day of November, 1900, and from each and every part of said orders.

Dated New York, January 7th, 1901.

Yours, &c., TRUMAN H. BALDWIN,
Attorney for Petitioner, Appellant, 31 Liberty Street, New York City.

To John Whalen, Esqre., corporation counsel; William Sohmer, Esqre., county clerk.

It is hereby stipulated that the foregoing are true copies of all the papers before the courts below in making the orders appealed from, the order appealed from, and the notice of appeal, and certification thereof is hereby waived.

Dated New York, January 19th, 1901.

TRUMAN H. BALDWIN,
Attorney for Appellant.
JOHN WHALEN,
Corporation Counsel.

16 *Affidavit of No Opinion.*

Supreme Court, Appellate Division, First Department.

In the Matter of the Petition of THE HOME FOR INCURABLES to Vacate or Reduce an Assessment for a Sewer in East 184th Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22nd, 1900.

COUNTY OF NEW YORK, *ss:*

John M. Perry, being duly sworn, says:

I am counsel for The Home for Incurables, the petitioner-appellant herein.

No opinion was given by the justices of the appellate division in affirming the order which denied the motion to vacate or reduce the assessment herein.

JNO. M. PERRY.

Sworn to before me this 19th day of January, 1901.

SIDNEY CURTIS,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

17 At a special term, part II of the New York supreme court, held in and for the county of New York, at the court-house thereof, in the said county, on the 22nd day of March, 1901.

Present: Hon. David McAdam, justice.

In the Matter of the Petition of THE HOME FOR INCURABLES, Appellant, to Vacate or Reduce an Assessment for a Sewer in East 184th Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22nd, 1900; The City of New York, Respondent. Order on Remittitur.

The above-named petitioner having appealed to the court of appeals of the State of New York, from the order of the appellate division of the supreme court in and for the first department, entered January 4th, 1901, which order affirmed an order of the supreme court entered on the 19th day of February 1900, denying relator's motion to vacate or reduce the above-mentioned assessment, and the said appeal having been duly argued at the court of appeals,

and the court of appeals after due deliberation having ordered and adjudged that the said order so appeal- from as aforesaid be affirmed with costs, and having further ordered that the record and proceedings therein be remitted to this court, there to be proceeded
18 upon according to law, now, upon reading and filing the said remittitur, and upon motion of John Whalen, corporation counsel, it is

Ordered that the said order and judgment of the court of appeals be and the same hereby are made the order and judgment of this court.

Enter.

D. McA., *J. S. C.*

19 New York Supreme Court, County of New York.

In the Matter of the Petitioner of THE HOME FOR INCURABLES, Appellant, to Vacate or Reduce an Assessment for a Sewer in East 184th Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22nd, 1900; The City of New York, Respondent. Judgment.

The above-named petitioner having appealed to the court of appeals of the State of New York, from the order of the appellate division of the supreme court in and for the first department, entered January 4th, 1901, which order affirmed an order of the supreme court entered on the 19th day of February, 1900, denying the relator's motion to vacate or reduce the above-mentioned assessment, and the said appeal having been duly argued at the court of appeals, and the court of appeals after due deliberation having ordered and adjudged that the said order so appealed from as aforesaid be affirmed with costs, and having further ordered that the record and proceedings therein be remitted to this court, there to be proceeded upon according to law, and an order having been duly entered in the office of the clerk of the county of New York on or about the 22nd day of March, 1901, making the order and judgment of the court of appeals the order and judgment of this court, and the costs of the respondent having been duly taxed at the
20 sum of $158.19, now upon motion of John Whalen, corporation counsel, it is

Ordered and adjudged that the said order and judgment of the court of appeals be and the same hereby are made the order and judgment of this court, and it is further

Ordered and adjudged that the above-named respondent, The City of New York, recover of the above-named appellant, The Home for Incurables, the sum of one hundred and fifty-eight and $\frac{19}{100}$ dollars ($158.19), the amount of its costs as taxed, and that it have execution therefor.

Dated, New York, April 4th, 1901.

WILLIAM SOHMER, *Clerk.*

21 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court upon a remittitur from the court of appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Home for Incurables, petitioner and appellant, and The City of New York, respondent and appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause

22 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said The Home for Incurables as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 17th day of April, in the year of our Lord one thousand nine hundred and one.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

23 [Endorsed:] Court of appeals. In the matter of the petition of The Home for Incurables to reduce an assessment for a sewer in East 184th street and Vanderbilt avenue west to Washington avenue confirmed January 22, 1900. Writ of error. Truman H. Baldwin, attorney for petitioner-appellant, 31 Liberty street, New York city.

24 Know all men by these presents, that we, The Home for Incurables, a body corporate under the laws of the State of New York, as principal, and The American Surety Company of New York, also a body corporate under the laws of the State of New York and having an office and principal place of business at No. 100 Broadway, in the city of New York, as surety, are held and firmly bound unto The City of New York, in the sum of five hundred dollars ($500.00) to be paid to the said The City of New York, its certain attorney, successor or assigns, for the payment of which well and truly to be made, we bind ourselves and each of us, our successors and each of them, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 12th day of April, in the year of our Lord, one thousand nine hundred and one.

Whereas the above-named The Home for Incurables has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the supreme court of the State of New York, upon remittitur from the court of appeals of the said State of New York, in the proceeding wherein the said The Home for Incurables was petitioner and appellant, and The City of New York was respondent;

Now, therefore, the condition of this obligation is such that if the above-bounden, The Home for Incurables, appellant aforesaid, shall prosecute the said writ of error with effect and answer all costs which may be awarded against it if it shall fail to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

AMERICAN SURETY COMPANY OF NEW YORK,
By DAVID B. SICKELS, *Vice-President.*
CORTLANDT S. VAN RENSSELAER,
[L. S.] *Attorney.*

Sealed and delivered and taken and acknowledged this — day of April, 1901, before me:

——— ———.

(Stamp.)

25 STATE AND COUNTY OF NEW YORK, *ss:*

On this 12th day of April, 1901, before me personally appeared David B. Sickels, vice-president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice-president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the

manner provided by law. And the said David B. Sickels further said that he was acquainted with Cortlandt S. Van Rensselaer, and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer, subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S. Van Rensselaer, and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels, vice-president.

[L. S.]

K. J. PEIRCEY,
Notary Public, Kings Co.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau Co's.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April 1893, the following resolution was adopted:

"Resolved, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Cortlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 12th day of April, 1901.

[L. S.]

CORTLANDT S. VAN RENSSELAER,
Attorney.

25½

American Surety Company of New York.

Incorporated April 14, 1884.

General offices, 100 Broadway.

Financial Statement, Mar. 30, 1901.

Resources.

Real estate and improvements	$3,054,567.16	
Stocks and bonds	1,515,584.00	
Bills receivable	701,667.99	
Cash in banks and offices	145,328.56	
Premiums in course of collection	234,423.26	
Accrued interest and rents	36,076.13	
		$5,687,647.10

Liabilities.

Capital stock	$2,500,000.00	
Surplus	1,000,000.00	
Undivided profits	1,093,306.39	
Premium reserve requirement	592,012.00	
Claims in process of adjustment	289,725.63	
Bills and accounts payable	212,603.08	
		$5,687,647.10

26 STATE OF NEW YORK, } ss:
County of New York, }

Cortlandt S. Van Rensselaer, being duly sworn, says: That he is an attorney of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws. That said company has also duly complied with and is duly qualified to act as surety under the act of Congress of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to section 4 of said act of Congress; that said American Surety Company of New York is worth more than $2,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

CORTLANDT S. VAN RENSSELAER.

Subscribed and sworn before me this 12th day of April, 1901.

K. J. PEIRCEY,
Notary Public, Kings Co.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau Co's.

27 [Endorsed:] Court of appeals. In the matter of the petition of The Home for Incurables to reduce an assessment for a sewer in East 184th street and Vanderbilt avenue west to Washington avenue confirmed January 22, 1900. Copy. Bond on writ of error. Truman H. Baldwin, attorney for petitioner, appellant, 31 Liberty St., New York city. Approved R. W. Peckham associate justice of the Supreme Court.

28 The Supreme Court of the United States.

THE HOME FOR INCURABLES, Petitioner and Appellant,
against
THE CITY OF NEW YORK, Respondent and Appellee.

October Term, Nineteen Hundred.

Afterwards, to wit, on the fifteenth day of April, in the year of our Lord, nineteen hundred and one, at the October term for nineteen hundred, at the Capitol in the city of Washington, and District of Columbia, comes the said The Home for Incurables by John M. Perry, its attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error, in this, to wit:

First. That by the judgment sought to be reviewed, The City of New York, the respondent-appellee is sustained in levying upon the property of the appellant, a special assessment for a local improvement, in substantial excess of the benefit accruing to it, in violation of the provisions of the fourteenth amendment to the Constitution of the United States.

Second. That such judgment sustains an assessment levied for a local improvement, one of the items of which is an interest charge upon certain advances to contractors calculated at the rate of six per cent. per annum, whereas the City of New York paid for the use of the money so advanced interest at the rate of three per cent. per annum or less, thereby making an arbitrary charge
29 against the appellant of a sum not expended by the city, and from which no benefit was received by appellant, in violation of the provisions of the fourteenth amendment of the Constitution of the United States.

Third. That such judgment sustains an *an* assessment for a local improvement which to the extent of the arbitrary interest charge included therein, is in excess of any benefit which the appellant receives from such improvement and for which, in default of payment of the assessment with the arbitrary interest charge included, the appellee may, in pursuance of the provisions of § 1027, &c., of ch. 378 of the Laws of the State of New York for the Year 1897 (the New York city charter), seize and sell its lands, all of which is in violation of the provisions of the fourteenth amendment of the Constitution of the United States.

Fourth. That in so far as the provisions of 946 of the said chapter 378 of the Laws of New York for the Year 1897, is an authorization for the judgment sought to be reviewed, such section is a violation of the provisions of the fourteenth amendment of the Constitution of the United States.

Fifth. That in said record aforesaid it appears that judgment was given for the respondent-appellee and against the petitioner-appellant, whereas by the law of the land judgment should have been given for the petitioner-appellant.

Sixth. That by the said judgment sought to be reviewed th petitioner-appellant is deprived of equal protection of the law, an is deprived of property without due process of law.

Wherefore The Home for Incurables, the petitioner-appellant prays this honorable court that its judgment may be had reversing the judgment of the supreme court of the State of New York, and directing the entry of an order by that court requiring a reduction of the assessment complained of to the extent of the interest complained of.

THE HOME FOR INCURABLES,
By JOHN M. PERRY, *Counsel.*

[Endorsed:] The Supreme Court of the United States. The Home for Incurables, petitioner and appellant, against The City of New York, respondent and appellee. Assignment of error. Truman H. Baldwin, attorney for petitioner-appellant, 31 Liberty street, New York city.

Court of Appeals.

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East 184th Street and Vanderbilt Avenue West to Washington Ave., Confirmed January 22, 1900; Home for Incurables, Appellant; The City of New York, Respondent.

I, Alton B. Parker, chief judge of the court of appeals of the State of New York, do hereby certify that in this proceeding the petitioner-appellant, The Home for Incurables, claimed in the courts of this State that the imposition of all or a part of the assessment on its land as set forth in the record herein was in violation of the statutes and constitution of the State of New York and of the provisions of the fourteenth amendment of the Constitution of the United States and constituted a taking of property without due process of law; that the respondent in this proceeding contended that the said assessment was neither in whole nor in part violation of the statutes and constitution of the State of New York or of the Constitution of the United States, and also that the said Home for Incurables had no remedy by petition to correct any errors in the said assessment; that this court decided that the said Home for Incurables did have a remedy by petition in the manner and form of the proceeding adopted by it to correct any errors in the said assessment, but that the assessment complained of was valid and without error as to each and every part thereof.

Witness my hand and the seal of this court at the city of Albany, in the State of New York, on this third day of April, 1901.

ALTON B. PARKER, *Ch. J.*

STATE OF NEW YORK, *County of New York,* } ss.:

I, William Sohmer, clerk of the said county, and clerk of the supreme court of said State for said county, do certify that I have compared the preceding with the original record in the matter of the petition of The Home for Incurables to vacate or reduce assessment

for a sewer in East 184th street from Vanderbilt Ave. west to Washington Ave., confirmed Jan. 22nd, 1900, on file in my office, and that the same is a correct transcript therefrom and the whole of such original.

In witness whereof I have hereunto subscribed my name and affixed my official seal this 20th day of April, 1901.

[Seal Supreme Court, New York.]

WM. SOHMER, *Clerk.*

[Ten-cent United States internal-revenue stamp, canceled Apr. 23, 1901.]

34 [Endorsed:] Court of appeals. In the matter of the petition of The Home for Incurables to reduce an assessment for a sewer in East 184th street and Vanderbilt avenue west to Washington avenue, confirmed January 22, 1900. Certificate. Truman H. Baldwin, attorney for petitioner, appellant, 31 Liberty street, New York city.

35 Court of Appeals.

In the Matter of the Petition of THE HOME FOR INCURABLES to Reduce an Assessment for a Sewer in East 184th Street and Vanderbilt Avenue West to Washington Avenue, Confirmed January 22, 1900.

COUNTY OF NEW YORK, *ss.:*

Sidney Curtis, being duly sworn, says:

I am managing clerk in the office of John M. Perry, of counsel for the petitioner-appellant herein, The Home for Incurables, at 55 William street, in the city of New York, and am over the age of twenty-one years.

On the 22nd day of April, 1901, between the hours of two and three o'clock in the afternoon of said day I served upon the corporation counsel the within citation at his office, No. 2 Tryon row, in said city. Such service was made by delivering to, and leaving with, Andrew T. Campbell personally, who is the chief clerk in the office of the said John Whalen, the corporation counsel, and who is authorized to accept the service thereof, a copy of the within original citation and at the same time exhibiting to him the signature of Hon. Rufus W. Peckham, associate justice of the Supreme Court of the United States, attached thereto.

At the time of such service I knew the person so served to be Andrew T. Campbell, the chief clerk in the office of said cor-
36 poration counsel, and the person authorized to accept the service of said citation for said corporation counsel.

SIDNEY CURTIS.

Sworn to before me this 23rd day of April, 1901.

JNO. S. COMFORT,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

37 UNITED STATES OF AMERICA, *ss:*

To the City of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of New York wherein The Home for Incurables is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 17th day of April, in the year of our Lord one thousand nine hundred and one.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Court of appeals. In the matter of the petition of The Home for Incurables to reduce an assessment for a sewer in East 184th street and Vanderbilt avenue west to Washington avenue, confirmed January 22, 1900. Citation. Truman H. Baldwin, attorney for petitioner, appellant, 31 Liberty St. N. Y. city.

Endorsed on cover: File No. 18,131. New York supreme court. Term No. 304. The Home for Incurables, plaintiff in error, *vs.* The City of New York. Filed April 24th, 1901.

No. 86.

Brf. of Perry for P. C.

Supreme Court U.S.
FILED
NOV 8 1902
JAMES H. McKENNEY,
Clerk.

Filed Nov. 8th 1902.

Supreme Court of the United States

THE HOME FOR INCURABLES
Plaintiff in Error

vs.

THE CITY OF NEW YORK
Defendant in Error

BRIEF FOR PLAINTIFF IN ERROR

JOHN M. PERRY
Counsel for Plaintiff in Error
55 William Street
New York City

EVENING POST JOB PRINTING HOUSE, NEW YORK.

Supreme Court of the United States.

THE HOME FOR INCURABLES, Plaintiff in Error, vs. THE CITY OF NEW YORK, Defendant in Error.	No. 86.

This case comes before this Court by virtue of a writ of error, directed to the Supreme Court of the State of New York, allowed by Mr. Justice Peckham on April 17, 1901 (fols. 21–23).

The plaintiff in error began a proceeding in the Supreme Court of the State of New York, in the manner prescribed by the statutes of that State, to reduce an assessment for a local improvement (a sewer) which had been levied against and made a lien upon real estate owned by it (fols. 1–4). That Court, after taking the evidence of the parties (fols. 5–8), denied the relief asked (fol. 9). An appeal was thereupon taken to the Appellate Division of that Court, which affirmed the denial (fols. 13–14). A further appeal was thereupon taken to the Court of Appeals (fol. 15), which Court likewise affirmed the denial (fols. 17–18), and remitted the proceeding to the Supreme Court (C., p. 1), where final judgment was entered against the plaintiff in error (fol. 20).

In none of the three courts was an opinion written (fols. 12–16), but the Chief Judge of the Court of Appeals certified (fols. 32–33) that the plaintiff in error

> " claimed in the courts of this State that the im-
> " position of all or a part of the assessment on its

"lands as set forth in the record herein was in "violation * * * of the provisions of the "Fourteenth Amendment of the Constitution of "the United States and constituted a taking of "property without due process of law; that the re- "spondent in this proceeding contended that the "said assessment was neither in whole nor in part "in violation of the * * * Constitution of "the United States: * * * that this Court de- "cided * * * that the assessment complained "of was valid and without error as to each and "every part thereof."

The facts out of which the case arose.

A sewer was laid in a street in New York City, which was in part adjacent to property owned by the plaintiff in error, and its lots were assessed therefor $4,657.88 for its share thereof (fol. 6). The sewer was laid pursuant to a contract made by the City with private contractors. As the work progressed the City from time to time paid the contractors varying amounts on account. The first of these payments was made May 2, 1896; the final payment was made December 2, 1897 (fol. 6). The assessment was levied January 22, 1900 (fol. 5).

The total amount of the assessment levied, all of which was assessed locally, was $74,349.94, made up of the following items:

Contract price	$58,840 08
Surveying	5,380 53
Inspecting	2,280 00
Interest	*7,837 33*
Binding assessment roll	12 00

(fol. 6).

The interest item is the only one in question.

All payments to the contractors were made from a fund in the City Treasury, known as the "Street Improvement Fund," which is made up from two sources, *i. e.*, from moneys received by the City from property owners in payment of all local assessments, and from moneys realized

from the sale of street improvement bonds (fols. 6–7). For the two years during which payments were being made to the contractors on account of this sewer, the greater part of this fund (about 60 per cent.) was derived from moneys paid to the City for assessments, the remainder (about 40 per cent.) represented the proceeds of sales of bonds (fols. 6–7).

The City paid no interest for the money it received; it paid only 3 per cent. interest on the bonds from which the interest bearing portion of the fund was realized.

The interest item in the assessment consists of interest on the various amounts advanced to the contractors, calculated at the rate of 6 per cent., although, as we have shown, the City paid no interest whatever for 60 per cent. of the amount so advanced, and only 3 per cent. for the remainder.

The City seeks to justify this action by the statement that in making up the assessment as it did it followed the provisions of § 946 of its charter (Ch. 378 of the Laws of New York of 1897), which reads as follows:

> "All assessments shall be made by the board
> " of assessors on the following certificates:
>
> "1. The officer or head of the board or depart-
> " ment charged with the execution of the work in
> " question shall certify to the board of assessors
> " the total amount of all of the expenses which
> " shall have been actually incurred by the City of
> " New York on account thereof.
>
> "2. The Comptroller shall certify to the board of
> " assessors the amount of interest at the *legal rate*,
> " upon the several installments advanced or pay-
> " ments made on account of such work from the
> " time of such payment or advances by the City to
> " a date sixty days after the date of such certificate.
> " Thereafter the board of assessors shall assess upon
> " the property benefited, in the manner authorized
> " by law, the aggregate amount of such certificates,
> " or such proportion thereof as is authorized by
> " law."

General statement of errors assigned (fols. 28, 29).

The plaintiff in error contends:

(1.) That the assessment should not exceed the actual cost to the City of the improvement, whether that cost be of money, material or labor, and that in *charging six per cent. interest* on *all* moneys used to pay the contractors, *when it paid* only three *per cent.* for part thereof, and no *interest* for the remainder, the City committed an illegal act.

(2.) That the section of the City Charter above quoted in authorizing such action violates the Fourteenth Amendment to the United States Constitution in that it sanctions a taking of property without due process of law, as nonpayment of the assessment as levied subjects the property owner to loss of his land by sale by the City (Charter, § 1,027, &c.).

ARGUMENT.

I.

This Court has jurisdiction to review the constitutional question raised by the plaintiff in error.

Although no formal motion has been made to dismiss the appeal for want of jurisdiction, it is fair to assume that question will be raised.

That this question of jurisdiction, at first blush, seems serious, we concede. But we are confident an examination of the record, in the light of the statutory situation in New York governing proceedings of the character of that at bar, with the guidance of the decided cases, will sustain our contention that this Court has before it a record which confers upon it jurisdiction to examine the merits of the question presented.

(*a.*) The New York Statutes.

Chap. 398 of the laws of New York for 1897 contains the New York City charter in force at the time of the institution of this proceeding. In respect of the questions here involved it is a mere re-enactment of the former charter of 1882.

The relief sought by the plaintiff in error was the reduction of an assessment for a local improvement. § 958 of that charter provides:

> "No suit or action in the nature of a bill in equity "or otherwise shall be commenced for the vacation "of any assessment in said city, or to remove a "cloud upon title; but owners of property shall be "confined to their remedies in such cases to pro- "ceedings under this title."

§ 959 contains the "remedy" referred to, which is that

> "The party aggrieved thereby may apply to a "Justice of the Supreme Court in Special Term or "in vacation, who shall thereupon, upon due "notice to the Corporation Counsel" hear the allegations and proof and proceed to grant relief.

These sections show that nothing that corresponds to a carefully drawn declaration or complaint or bill in equity is permissible. In fact, no written pleading of any kind is necessary. A mere application to the Court after notice is all that is required. In the case at bar the proofs were taken under stipulation before the application was made (fols. 5–8). When the application was made it was accompanied by a "petition" (fols. 1–5), so-called. No such petition is provided for or authorized by the statute and it is in fact more in the nature of a bill of particulars of the complainant's contention than anything else, and could well have been dispensed with. No authority can be found for the assertion that it must comprehend all the complainant's grounds of relief, or that complainant would be precluded from claiming relief on grounds other than those therein stated. The field of argument was as wide open as though no "petition" had been filed.

The petition in this case said, among other things, that so much of the legislation (Charter, § 946, *supra*) as authorized the interest charge complained of, "is in violation "of the Constitution of the State of New York, in that "said portion of said act authorizes the taking of private "property without just compensation, and said portions of "said act authorizes an unlawful exercise of the power of "taxation." It did not make special reference to the fourteenth amendment to the United States Constitution.

But on the "hearing," in the State Supreme Court, when under the charter that Court heard the "proofs "and allegations" (Charter, § 959), the claim of protection under the fourteenth amendment was alleged and asserted, and it was reasserted on the appeal to the Appellate Division and on the appeal to the Court of Appeals, and Chief Judge Parker certifies that

> "it was claimed in the courts of this State that the "imposition of all or part of the assessment * * * "was in violation * * * of the fourteenth "amendment of the Constitution of the United "States, and constituted a taking of property with-"out due process of law" (fol. 32).

In short, there was nothing in the State statutes that provided or required that the claim of the protection of the fourteenth amendment or any other claim of legal right should be made other than orally as part of the allegations on the hearing, and having been so made, there was no way of having that fact appear in the record (there having been no opinion rendered by any of three courts which have considered the question) other than by a certificate of the Judge.

That certificate does not inject new matter, nor does it import an afterthought, into the record. It simply reproduces the situation presented to all of the State courts, and makes clear matter of which, owing to the peculiar provisions of the State statute, the record does not directly speak.

(*b.*) As to the decisions of this Court on the question of jurisdiction as affected by a Judge's certificate.

In *Johnson* vs. *Risk*, *137 U. S., 300, 307*, it was said:

> "The defendant below demurred upon two general grounds, one of which involved the construction of the bankrupt act of March 2, 1897, and the other the bar of the Statute of Limitation of the State of Tennessee. So far as we are advised no opinion was given by the Supreme Court of that State upon rendering the judgment of affirmance, and the record discloses no specific statement of the ground upon which the Court proceeded. Inasmuch as one of the defenses called for the construction and application of a State statute in a matter purely local, in respect to which great weight, if not conclusive effect, should be given to the decision of the highest court of the State (Gormley *vs.* Clark, 134 U. S., 338-348), *the plaintiff in error, if he wished to claim that this cause was disposed of by the decision of a federal question, should have obtained the certificate of the Supreme Court to that effect*, or the assertion in the judgment that such was the fact."

The case at bar presented two questions in the State court, one the constitutional question, and the other relating to procedure, and it was to obviate the embarrassment presented in *Johnson* vs. *Risk* that we procured the statement in the certificate that this case was not determined on the question of procedure (fol. 33).

In *Parmalee* vs. *Lawrence*, *11 Wal., 36, 39*, it was said:

> "The office of the certificate" (of the State court Judge) "as it respects the federal question, is to " make more specific and certain what is too gen- " eral and indefinite in the record, but it is incom- " petent to originate the question, within the true " construction of the 25th Section."

In *Meyer* vs. *City of Richmond*, *172 U. S., 82, 92*, the Court, after reviewing a number of authorities, said:

> " In all of these cases the federal question was not " presented in any way to the lower Court, nor to " the higher Court until after judgment. It is not, " therefore, decided that a presentation to the lower " Court at some stage of the proceeding and in ac- " cordance with its procedure, and a presentation

> " to the higher Court before judgment would not
> " be sufficient."

In *Columbia Water Power Co.* vs. *Columbia Electric Co.*, 172 U. S., 475, it was said (p. 488):

> " Where the validity of a treaty or statute of the
> " United States is raised, and the decision is against
> " it, or the validity of a State statute is drawn in
> " question, and the decision is in favor of its valid-
> " ity, this Court has repeatedly held that, if the
> " federal question appears in the record and was
> " decided, or such decision was necessarily in-
> " volved in the case, and the case could not have
> " been determined without deciding such question,
> " the fact that it was not specifically set up and
> " claimed is not conclusive against a review of such
> " question here."

In *Kaukauna Water Power Co.* vs. *Green Bay Co.*, 142 U. S., 254, it was said:

> " Notwithstanding the inhibition of the Consti-
> " tution is not directly put in issue by the plead-
> " ings, nor directly passed upon in the opinion of
> " the Court, it is evident that the Court could not
> " have reached a conclusion adverse to the defend-
> " ant company without holding either that none of
> " its property had been taken or that it was not
> " entitled to compensation therefor, which is equiv-
> " alent to saying that it had not been deprived of
> " its property without due process of law. This
> " Court has had frequent occasion to hold that it is
> " not always necessary that the federal question
> " should appear affirmatively on the record, or in
> " the opinion if an adjudication of such question
> " were necessarily involved in the disposition of
> " the case by the State court."

The plaintiff in error contends:

(1.) That the practice prescribed by the statute rendered it proper to raise the federal question by allegations at the hearing.

If an opinion had been rendered this Court could have examined that.

> *Gross* vs. *U. S. Mortgage Co.*, 108 U. S., 477;
> Rule IV. of the New York Court of Appeals
> Rules.

If that opinion had indicated that the federal question was considered by the State court, this Court could have assumed jurisdiction. In default of an opinion the only recourse was to a certificate. Plaintiff's right to a review surely cannot be made to depend upon the writing or failure to write an opinion in the State court.

(2.) The federal question having, under the State practice, been properly raised on the argument, the certificate of the Judge to that effect did not originate that question, but reduced to record form that which had been and at the foundation of the case from its first presentation to the lowest State court.

(3.) The federal question was necessarily involved in the disposition of this case by the State courts.

Under the rule stated in *Columbia Water Power Co.* v. *Columbia Electric Co.*, 172 U. S., 475, and *Kaukauna Water Co.* vs. *Green Bay Co.*, 142 U. S., 254 (already cited), this is sufficient to give this Court jurisdiction.

That it was so involved is shown by our argument under Point II. (*infra*).

Before leaving this jurisdictional question we wish to advert to the case of *The New York Central Railroad against the City of New York*, decided by this Court in June last

In that case a proceeding was brought to vacate an assessment for a local improvement levied by the City of New York. The plaintiff was unsuccessful in the State courts and brought the case here by writ of error, which writ was dismissed.

That case will doubtless be relied upon by the defendant in error. We submit it is distinguishable from the case at bar. In that case an opinion was written in one of the State courts, to which allusion is made in the opinion of this Court; and it appears from the opinion of the State court that that Court decided the case on the question of the want of power under the statute to grant the relief asked in the form of proceeding adopted; in other words

there was a question of State procedure which was decided adversely to the plaintiff in error. This is apparent from the following extract from the end of the opinion in that case (which will be found at folio 71 of that received in this Court).

" The Courts below were therefore right in determining " that the special remedy invoked by the petitioner had " no application to the case which he had presented."

In the case at bar we have the certificate to the effect that the question of procedure though raised was decided favorably to the plaintiff in error, so that question did not form the ground for its defeat.

Again, in the *New York Central* case there is no explicit statement in the certificate that the federal question was raised. The appellant's brief in the State court is certified. That is all. Here we have the statement of the Judge that the federal question was raised and decided adversely to the plaintiff in error.

II.

(*A.*) The constitutional question was necessarily involved in the disposition of this case by the State courts.

(*B.*) In upholding the assessment the State courts deprived plaintiff in error of a right guaranteed by the fourteenth amendment.

(*A.*)

The certificate shows that the State courts upheld the plaintiff in error on the question of procedure.

This left only the question of the validity of the assessment.

The statement of facts made at the beginning of this brief shows the situation. The question is in very small compass. It is, "Could the City charge the property

owner, as part of the cost of the improvement, interest at the rate of 6 per cent. on the money it advanced to the contractor when it paid no interest at all for part of this money and only 3 per cent. for the balance?"

Obviously the answer to this question involves the extent of the City's power in levying local assessments, and co-relatively the rights of the property owners assessed, property rights of which he cannot be divested without due process of law; and this was the case presented and argued in all of the State courts.

(*B.*)

In upholding the assessment the State courts deprived plaintiff in error of a right guaranteed by the fourteenth amendment.

The record (fol. 8) shows that this assessment included a charge of $7,837 for interest on the advances made to the contractor calculated at the rate of 6 per cent. (fol. 8).

But on over 60 per cent. of the fund from which this was paid the City paid no interest; on the remaining 40 per cent. it paid only 3 per cent. (fol. 8). The real cost in interest to the City was therefore only about $1,567.46, upwards of $6,000 less than the amount included in the assessment.

If the Legislature has the right to say that the City shall include in any assessment an item for interest on advances made contractors at the rate of 6 per cent. when in fact the City only pays 3 per cent. for the money so advanced, it has an equal right to say that the rate shall be 60 per cent. or 600 per cent.

This is not taxation, it is confiscation. And the levying of such an assessment by the City which is the first step towards its acquiring the property, in case of nonpayment, is clearly a taking of property without due process of law.

The whole theory upon which local assessments are sustained is that the property assessed is to recieve a benefit corresponding with the amount assessed and that this is

to be paid to meet the cost and expense of the improvement.

Cooley on Taxation (2d Ed.), 606.
2 Desty on Taxation, 1237–1238.
25 A. & E. Ency. Law, Topic Taxation, p. 496.
In re Meade, 74 N. Y., 216–221.
1 Hares Am. Const. Law, 310.
French *vs.* Barbour Asphalt Co., 181 U. S., 324.
Norwood *vs.* Baker, 172 U. S., 269.

What compensation by way of benefit did this property receive from this excess interest charge? Absolutely none.

The only cases in which it has ever been held that the assessment could exceed the actual cost of the work, are cases where the work was part of a general scheme of improvement.

Parsons vs. *District of Columbia, 170 U. S., 45*, illustrates that class of cases (see pp. 56–57 of the Opinion).

There the excess above the actual cost was sustained on the theory that the excess represented a share in a fund which was to be raised to keep in repair, &c., the system of which the special assessment (a water main) formed a part, and did not go into the general treasury of the District.

There is no such question in this case. Here the excess represents an actual profit to the City to the benefit of the citizens at large, at the expense of the plaintiff in error.

That an assessment containing such an item is, to the extent of the excess above the cost, invalid, and that the loss of property from a failure to pay the same, is a deprival of such property without due process of law, is apparent.

The mere statement of the proposition is the most cogent argument in its support.

Extended quotations from or citations of authorities seem unnecessary.

The State ex rel. vs. *The City of Elizabeth*, 37 New Jersey Law, 142; and *Drake* v. *Austin*, 47 Cal., 353-358, are selected for reference because they both involve the question of the including in an assessment roll of an interest item which the municipality was not itself obliged to pay and they both condemn such item.

In this Court *Norwood* vs. *Baker*, 172 U. S., 269, is in point. The head note states:

> "The principal underlying special assessments
> " upon private property to meet the cost of public
> " improvements is that the property upon which
> " they are imposed is peculiarly benefitted, and
> " therefore that the owners do not in fact pay any-
> " thing in excess of what they receive by reason of
> " such improvement.
>
> " The exaction from the owner of private prop-
> " erty of the cost of a public improvement in sub
> " stantial excess of the special benefits accruing to
> " him is to the extent of such excess, a taking
> " under the guise of taxation of private property
> " for public use without compensation."

French vs. *The Asphalt Co.*, 181 U. S., 324, if it differ from the Norwood case at all, does not differ on this proposition.

These two cases have been so recently decided by this Court, and the whole field of assessment for local improvements is so exhaustively treated in the opinions there rendered, that little remains to be said.

It is to be noted that in so far as there may be a difference of opinion on this subject it relates to the question of the method of ascertaining the benefit conferred by the improvement so as to properly apportion the cost. They all assume that *the cost of the improvement* is the thing that is to be apportioned. Our complaint is not that the cost of the improvement is not properly apportioned, but that there is included in the cost an item that forms no part thereof and from which we derive no benefit.

III.

The case should be remanded to the State court, with instructions to deduct from the amount of the assessment all interest in excess of that actually paid by the City.

JOHN M. PERRY,
Counsel for Plaintiff in Error.

1050

No. 86.

NOV 10 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Rives, Connoly & Sterling

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

For D. C.

No. 86.

Filed Nov. 10, 1902.

THE HOME FOR INCURABLES,
Plaintiff-in-Error,

against

THE CITY OF NEW YORK,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

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GEORGE L. STERLING,
Of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1902.

THE HOME FOR INCURABLES, Plaintiff in Error, *against* THE CITY OF NEW YORK, Defendant in Error.	No. 86.

In error to the Supreme Court of the United States:

Statement and points in behalf of the City of New York, defendant in error.

This is a review by writ of error of a decision of the Supreme Court of the State of New York which was affirmed by its Court of Appeals.

The proceeding was what is known under the New York practice as a special proceeding, and was brought to obtain a reduction of an assessment for a local improvement—namely, a sewer in the City of New York.

The motion for the reduction was denied at the Special Term of the Supreme Court and the order denying the motion was affirmed by the Appellate Division of the Supreme Court in the First Department of

the State of New York, and on appeal to the Court of Appeals the order of the Appellate Division was in its turn affirmed.

No one of the three courts which have passed upon this matter has written an opinion.

The record shows an unverified petition, and also certain testimony (Record, pages 4–6).

The alleged grievance of the petitioner is the inclusion of interest at the rate of six per cent. in the assessment, a part of which was placed upon the property of plaintiff in error instead of three per cent., it being shown by the evidence that the City paid three per cent. to borrow the money to replenish the Street Improvement Fund formed under sections 144 and 150 of the Consolidation Act, and from which fund the contractor was paid for the work for which the assessment was imposed (Record, 6).

The only question of constitutionality in the record appears at the bottom of page 3 of the record, as follows :

> "That so much of the Act of the Legislature of
> "the State of New York known as section 868 of
> "the New York City Consolidation Act of 1882 as
> "purports to authorize and direct the making of
> "such interest certificate and the assessment of
> "the amount thereof herein *is in violation of the*
> "*Constitution of the State of New York in that* said
> "portion of said Act authorizes the taking of pri-
> "vate property without just compensation, and
> "said portion of said Act purports to authorize an
> "unlawful exercise of the power of taxation."

It will be noted, of course, that the violations are specifically alleged to be violations of the State Constitution.

It will be noted that nowhere in the papers appears the exact sum at which the plaintiff in error places its damage, and while the same must be small, it can only be ascertained by a complicated computation.

It will also be noted that *nowhere in the record is there an allegation that the petitioner has been assessed in an amount exceeding the special benefits accruing to him.*

In connection with the facts of the case, the attention of the Court is respectfully called to the provisions of law which govern it.

Until January 1, 1898, there was in force in the City of New York, chapter 410 of the Laws of 1882, known as the Consolidation Act, and under this act all proceedings were had in reference to the assessment in question up to and including the certificate of final completion of the contract by the Comptroller, 2d February, 1897 (Record, page 5), and payment of the last installment due on the contract, 2d December, 1897.

That is to say, that all matters arising under the contract and work up to January 1, 1898, were under the Consolidation Act.

It is under this Act, sections 144 and 150, that bonds were issued which by the terms of the statute could *not exceed six per cent.* in interest to replenish the Street Improvement Fund out of which were paid the installments due the contractor (See statutes in Appendix).

The next step in the proceeding, however, namely, the interest certificate of the Comptroller, bearing date 6th December, 1898, was under the new Charter, chapter 378 of the Laws of 1897, and known as the Greater New York Charter, which took effect 1st January, 1898, and section 964 of this Charter (which section was a revision of section 868 of the Consolidation Act) is applicable thereto.

The assessment involved was confirmed on the 22d of January, 1900, and this proceeding was begun by the service of a petition on the Corporation Counsel February 9, 1900. The provisions of the Greater New York Charter therefore apply, and the proceeding is under sections 959 to 963 of that Charter (Laws of 1897, chapter 378).

These sections are a re-enactment, with modifications, of sections 898 to 914 of the New York City Consolidation Act (chapter 410 of the Laws of 1882), which sections, in turn, were derived mainly from chapter 338 of the Laws of 1858 and chapter 550 of the Laws of 1880.

A sewer in East One Hundred and Eighty-fourth street was constructed by the City of New York in the usual manner by contract at a cost to the City of $58,840.08. There were certain other expenses connected with it amounting to $15,509.86. The total amount of the assessment was thus $74,349.94 (Record, 5), which was assessed upon the property deemed benefited by the improvement by the Board of Assessors, which assessment was confirmed by the Appellate tribunal called the Board of Revision of Assessments.

Of this amount the sum of $4,657.28 was assessed upon a tract of land belonging to the petitioner, The Home for Incurables (Record, 5).

The only real complaint of the assessment made by the institution is as to the inclusion of a certain item for interest. It is claimed that this item is illegal as to one-half thereof and that the assessment should be reduced accordingly.

The amount of this interest charge is $7,837.33, one-half of which, *i. e.*, $3,918.66 (interest at 3 per cent.), the petitioner in effect concedes to be

legal. That is, about 5 per cent. only of the assessment is claimed to be illegal, and if the contention of the petitioner is correct the assessment upon its property should be reduced by about $235, which is all that is involved in this case.

The point raised by the petitioner, briefly stated, is that the City has included in the assessment a charge for interest calculated at 6 per cent. instead of 3 per cent., thereby making an unlawful profit and gain, which would result in a violation of the constitutional provision against the taking of private property without just compensation and be an unlawful exercise of the power of taxation (Record, pp. 2, 3).

The general answer to the petitioner's claim is that:

The amount included for interest is in accordance with the positive provisions of statute law, and the assessment, therefore, entirely legal.

The manner of assessing for improvements of this character may be briefly stated as follows:

When the project has been duly authorized a contract is made by the City authorities. The City pays the contractors from time to time as the work progresses under the terms of the contract; that is, the City advances the money.

The money paid on the installments comes out of a general fund, known as the street improvement fund, composed partly of collections on account of assessments for street improvements, and partly of the proceeds of assessment bonds sold under sections 144 and 150 of the Consolidation Act. (This section was, after the payments to the contractors in the present case, revised and re-enacted on January 11, 1898, as section 181 of the Greater New York Charter, Laws of 1897, chapter 378.)

When the work has been completed the assessment must be laid since January 1, 1898, as follows (sec. 946 of the Greater New York Charter):

> " All assessments shall be made by the board of " assessors on the following certificates, to wit:
>
> " 1. The officer or head of the board or depart- " ment charged with the execution of the work in " question shall certify to the board of assessors " the amount of all the expenses which shall have " been actually incurred by the city of New York " on account thereof.
>
> " 2. The comptroller shall certify to the board of " assessors *the amount of interest at the legal rate,* " *upon the several installments advanced or payments* " *made on account of such work from the time of such* " *payment or advance by the city to a day sixty days* " *after the date of such certificate.* Thereafter the " board of assessors shall assess upon the property " benefited in the manner authorized by law, the " aggregate amount of such certificates, or such " proportion thereof as is authorized by law."

As has been stated a contract was made January 9, 1897, by the City with Norton & Dalton for the work, and payments were made to them of $58,840.08, in ten installments, beginning May 2, 1896, and ending December 2, 1897 (Record, p. 5).

In accordance with the second subdivision of section 946 of the Charter, quoted above, interest amounting to $7,837.33, as shown by the interest certificate (Record, p. 5), has been included in the assessment.

This interest has been calculated, we understand, in accordance with said statute, as follows:

At 6 per cent. on the several installments from the day of payment to the contractor to a day sixty days

after the date of the said interest certificate made under section 946 of the Greater New York Charter.

The said interest certificate is dated December 6, 1898 (Record, p. 5). Hence interest has been calculated to about February 6, 1899; that is, from the date of the payments of the said ten installments, to a day sixty days after the date of the said interest certificate *as required by the statute above quoted.*

It is admitted that this provision of statute was followed in the present case, but the petitioner asserts that by the process which is prescribed the City practically makes a profit out of the transaction, as it could borrow money at 3 per cent., while it charges 6 per cent. to the property-owners, and that the statute allowing it to do so is unconstitutional because, as urged, it results in taking, under the guise of taxation, private property for public use without just compensation.

The petitioner fails to prove, however, that the City does make a profit, and furthermore, it is submitted that, if it were conceded that the City did make a profit out of the transaction, there would be nothing unconstitutional in this statute allowing it to do so, because the statute merely furnishes a simple, reasonable, practical method by which the City can reimburse itself for its outlay in the construction of local improvements.

The petitioner fails to show that the City does make a profit.

The City has charged, as a part of the expense, interest at 6 per cent. from the time the money was paid to February 6, 1899. It has paid the contractor out of the "Street Improvement Fund" for constructing the sewer.

The following is all the evidence as to this branch of the case (Record, 5, 6):

"During the year 1896, that fund (the Street "Improvement Fund) amounted to $3,931,459.39. "Of that sum $2,131,459.39 consisted of moneys "which were collected by the City from property-"owners for assessments for local improvements, "confirmed during or previous to the year ending "December 31, 1896, and $1,800,000 thereof con-"sisted of amount realized from sale of bonds "issued pursuant to sections 144 and 150 of the "New York Consolidation Act, which bonds bore "interest at the rate of 3 per cent. per annum, and "which were sold at par.

"During the year 1897 the said Street Improve-"ment Fund amounted to $2,919,062.48, of which "$1,969,062.48 was collected from property-owners "for assessments levied during or prior to the year "ending December 31, 1897, and $950,000 was "realized on the sale of assessment bonds pursuant "to sections 144 and 150 of the New York City "Consolidation Act, which bonds bore interest at "the rate of 3 per cent. and were sold at par.

"There is nothing in the books of the City to "show whether the specific sums which were used "to make payment on the contract in question "were derived from moneys paid into the fund on "account of assessments collected or from moneys "realized from bond sales."

"The interest included in the gross amount of "this assessment ($7,837.33), is interest at the rate "of six per cent. upon the several payments made "to the contractors on account of this work, and "is included in the total cost of the work pursuant "to the provisions of section 868 of the Consoli-"dation Act (re-enacted as sec. 946 of the Charter)."

It is argued from the above that the City makes a profit by charging six per cent. on money which is borrowed at three per cent. But does it make such profit?

As stated above, interest at six per cent. has been charged from the time of payment to the contractor to February 6, 1899. The assessment, however, was not confirmed until January 22, 1900 (Record 3), *so that no collection of the money expended could be made by the City until January* 22, 1900.

Furthermore, the persons assessed have, under the statutes (sec. 1019 of the Charter), sixty days after confirmation and entry of the assessment in which to pay without interest. *No interest, therefore, at all was charged upon the petitioner, or any one assessed, from February* 6, 1899, *to about March* 21, 1900, *or for about one year and one and one-half months.*

It may be observed here that the City might, under the strict letter of the law, by not making out the interest certificate until shortly before the confirmation of the assessment, have charged an additional sum of $5,018.63, being the interest on $74,349.94 at six per cent. for one year one and one-half months.

This it did not do, but passing this, it is evident from the following that the City has not charged the persons assessed with six per cent. on the money it advanced to the contractor for the period it was out of possession of the same, but with only a little, if any, more than three per cent., and has not made a profit of three per cent., and probably no profit at all. At any rate it has not been shown that it has made any.

We will endeavor to make this clear by the following:

As already stated, the amount of interest actually charged is..... ..... $7,837 33

If this interest had been calculated at three per cent. instead of at six per cent. the amount of interest would have been.....	$3,918 66
If interest, also at three per cent., had been calculated on the total amount of the assessment, *i. e.*, $74,349.94, for the said one year one and one-half months (and this would have been clearly allowable under the strict letter of the law), there would have been added to the assessment the sum of.....	2,509 32
Making the total interest chargeable	$6,427 98

That is, the sum actually charged is only $1,409.34 *more than the interest would have been if calculated at the rate of three per cent. for the whole period during which the City was out of the use of the money.*

If we take into account other expenses which are really part of the cost to the City of levying assessments, as, for instance, the salaries of the assessors and their clerks and other employees, and the cost of advertising, it is reasonable to suppose that the balance would be exhausted, and it would be found that the City, instead of making a profit, had suffered a loss.

It is to be remembered also that the petitioner had the benefit of the improvement from the time of its completion, which was about February 2, 1897 (Record, p. 5), for a period of one year one and a half months without any charge for interest; that is, it had the use of its money for that period, and at the same time the benefit of the improvement without charge.

In the appendix hereinafter is given so much of the statute law of the State of New York as is believed to be relevant to the present proceeding.

The only provisions of the Consolidation Act as distinguished from the Greater New York Charter which are material here are those of sections 144 and 150, which are given in the appendix.

FIRST POINT.

The allegations of the petition cannot be taken as evidence.

An examination of the record will show that the petition is unverified.

The statute under which the proceeding is brought requires no petition whatever. All that is necessary is that the party aggrieved shall apply to a Justice of the Supreme Court, "who shall thereupon, upon due notice to the Corporation Counsel, proceed *forthwith* to hear the proofs and allegations of the parties" (Greater New York Charter, Laws of 1897, chapter 378, section 959, quoted in full in appendix).

In this proceeding under the New York practice no answer is interposed, and the Court acts upon the testimony taken.

This proceeding is, as will be seen from the part of the section cited, of the most summary nature, and therefore the petition, even if verified, which the present one is not, not being called for by the statute, could not be received as evidence of any fact.

The only *facts* in the case are to be found in the record, pages 4 to 6, and upon these facts the plaintiff in error must rest its case in this Court.

SECOND POINT.

The writ should be dismissed for the reason that a case giving this Court jurisdiction is not made out by the record within the meaning of section 709 of the United States Revised Statutes, and within the decisions of this Court thereunder.

While resort cannot be had, as has been already stated, to the petition for proof of facts, recourse may be had thereto to show what was the theory of the case of plaintiff in error in the State courts, and the issues there litigated.

As has been already said, the only constitutional question stated in the petition is on page 3 of the record, that section 868 of the New York City Consolidation Act of 1882 is, so far as it "purports to authorize and direct the making of such interest certificate, and the assessment of the amount thereof herein, is *in violation of the Constitution of the State of New York, in that* said portion of said act authorizes the taking of private property without just compensation, and such portion of said act purports to authorize an unlawful exercise of the power of taxation."

While it is true a certificate (which legally forms no part of the record) has been given by Hon. Alton B. Parker, Chief Judge of the Court of Appeals, from which it would appear that questions were argued in the State courts as to whether said assessment was or was not in violation of the Constitution of the United States, it nowhere appears that the case was decided upon any ground other than that stated in the petition, and which was quite sufficient, namely, whether or not the statute authorizing the imposition of interest was a violation *of the State Constitution* in two respects.

There is no evidence that the Court in any way considered, or based its decision upon, any provision of the Constitution of the United States.

It is submitted that in such a case, where the record itself is clear, a certificate of the presiding Justice of the State court that something outside of the record was considered and argued cannot overcome the rule of decision of this Court that it will hear such a case as this upon the record itself.

The office of a certificate is to remove doubt or uncertainty; but where there is neither one nor the other in the record, the certificate becomes valueless.

It is submitted, therefore, that the certificate of the Chief Judge of the Court of Appeals is not sufficient to contradict the present record and to give this Court jurisdiction.

The cases given below lay down clear and distinct rules as to the jurisdiction of the Court.

Tho first rule sought to be invoked is that the Court will be governed by the record itself, and not by the assignments of error nor the certificate of the Presiding Justice of the State court in determining what questions were before that court.

While due force and effect will be given to the certificate, yet, as this Court has several times said, *the record itself* is the most important thing, and, while it may be made clearer, it cannot be contradicted or questioned.

Some of the decisions cited also support another ground of objection of defendant in error to the jurisdiction of this Court, namely, that where a case may have been decided by the State court upon a ground which is not a Federal question, this Court will not entertain jurisdiction.

As has been already stated, the certificate is absolutely silent upon *the decision* of any Federal question, the Court finding in favor of the present plaintiff in error on the question of procedure, but holding generally "that the assessment complained of was valid and without error as to each and every part thereof" (Record, p. 16).

The following are the principal cases on the effect of a certificate of a presiding Justice of a State court:

Parmelee *vs.* Lawrence, 11 Wall., 36–38.
Klinger *vs.* Missouri, 13 Wall., 257.
Murdock *vs.* City of Memphis, 20 Wall., 590, 634.
Miller *vs.* Cornwall R. R. Co., 131 U. S., 134.
Johnson *vs.* Risk, 137 U. S., 300, 307.
Roby *vs.* Colehour, 146 U. S., 153, 159.
Eustis *vs.* Bolles, 150 U. S., 361, 366.
Powell *vs.* Brunswick County, 150 U. S., 433, 439.
Dibble *vs.* Bellingham Bay Land Co., 163 U. S., 63, 69.
Zadig *vs.* Baldwin, 166 U. S., 485, 488.
Oxley Stove Co. *vs.* Butler County, 166 U. S., 648, 653.
Yazoo and Mississippi R. R. Co. *vs.* Adams, 180 U. S., 41, 48.

Two recent cases may also be cited on the proposition now contended for.

The first is Michigan Sugar Co. *vs.* Michigan, 185 U. S., 112, in which the alleged error assigned was that the judgment of the Supreme Court of Michigan was in conflict with the prohibitions of the Constitution of the United States in respect of impairing the obligation of contracts, the deprivation of property

without due process of law and the denial of the equal protection of law.

This Court said:

> "The petition for mandamus nowhere set up "that the State of Michigan had passed any law "impairing the obligation of a contract with the "relator and nowhere invoked the protection "of any provision of the Federal Constitution, "nor was any issue in relation thereto raised upon "the record. * * *
>
> "The rule is firmly established, and has been "frequently reiterated, that the jurisdiction of "this Court to re-examine the final judgment of a "State Court, under the third division of section "709, cannot arise from any inference, but only "from averments so distinct and positive as to "place it beyond question that the party bringing "the case here from such Court intended to assert "a Federal right. The statutory requirement is "not met unless the party unmistakably declares "that he invokes for the protection of his rights "the Constitution, or some treaty, statute or com-"mission, or authority, of the United States. "Applying this rule to the case before us, the "writ of error cannot be maintained."
>
> Michigan Sugar Co. *vs.* Michigan, 185 U. S., 113.

The latest case in this Court on this question is New York Central and Hudson River Railroad Co. *vs.* New York, 186 U. S., 269, where this Court said:

> "Assuming, without intimating an opinion to "that effect, that the raising of a Federal question "in the brief might be sufficient, it is well settled "in this Court that it must be made to appear

> " that some provision of the Federal, as distin-
> " guished from the State Constitution, was relied
> " upon, and that such provision must be set forth
> " (Porter *vs.* Foley, 24 How., 415; Miller *vs.* Corn-
> " wall R. R. Co., 168 N. Y., 131; Dewey *vs.* Des
> " Moines, 173 U. S.; 193 Keokuk, etc., Bridge Co.
> " *vs.* Illinois, 175 U. S., 626; Chapin *vs.* Fye, 179
> " U. S., 126).
>
> " It is hardly necessary to say that the raising
> " of such a question in the assignment of error in
> " this Court is insufficient."
>
> N. Y. C. & H. R. R. R. Co. *vs.* New York,
> 186 U. S., 269–273.

Counsel for defendant in error are not unmindful of the rule laid down in Spencer *vs.* Merchant, 125 U. S., 345, and other cases, that this Court will in certain cases review a case in which the provisions of the United States and State constitutions are identical, although a violation of the United States Constitution is not in terms claimed in the record.

But this rule has not yet, counsel believes, been applied to such a case as the present one, in which the record specifically claims a violation of the State Constitution and of nothing else.

THIRD POINT.

The plaintiff in error has not shown that his property was assessed in an amount exceeding the special benefits accruing to it.

Plaintiff in error has sought to invoke the principle laid down in Norwood *vs.* Baker, 172 U. S., 269, and

defendant in error is well content to have this rule applied to the present case.

It has been already stated that the petition contains no allegation of any specific sum in which plaintiff in error has been damaged, and there is no allegation in the petition that the amount assessed exceeds the amount of benefit.

Applying to this state of facts the case of Norwood *vs.* Baker, it is clear that plaintiff in error must fail.

After stating that the Legislature has a large discretion in defining the territory to be deemed specially benefited by a public improvement, this Court said in that case :

> " The principle underlying special assessments " to meet the cost of public improvement is that " the property upon which they are imposed is " peculiarly benefited, and therefore the owners do " not in fact pay anything in excess of what they " receive by reason of such improvement. * * *
>
> " In our judgment the exaction from the owner " of private property of the cost of a public im- " provement in substantial excess of the special " benefits accruing to him is, *to the extent of such* " *excess*, a taking, under the guise of taxation, of " private property for public use without com- " pensation. We say 'substantial excess' because " the exact equality of taxation is not always at- " tainable, and for that reason the excess of cost " over special benefits, unless it be of a material " character, ought not to be regarded by a court " of equity when its aid is invoked to restrain the " enforcement of a special assessment."

Norwood *vs.* Baker, 172 U. S., 278, 279.

As to the "due process of law" this Court said in another case, in reference to the fourteenth amendment and its objects and purposes:

> "These are to extend United States citizenship "to all natives and naturalized persons and to "prohibit the States from abridging their privileges and immunities and from depriving any "person of life, liberty or property without due "process of law and from denying to any person "within their jurisdiction equal protection of the "law. It contemplates persons and classes of "persons. It has not respect to local and municipal regulations that do not injuriously affect "or discriminate between persons and classes of "persons within the places or municipalities for "which such regulations are made."

Missouri *vs.* Lewis, 101 U. S., 22.

In a well-known case, Spencer *vs.* Merchant, 125 U. S., 345, this Court had occasion to examine the question of constitutionality in a somewhat similar case.

It cited with approval and applied the principle laid down in the opinion of the New York Court of Appeals in the same case, which was in part as follows:

> "By the Act of 1881 the Legislature imposes "the unpaid portion of the cost and expense, "*with the interest thereon*, upon that portion of the "property benefited which has thus far borne "none of the burden. In so doing it necessarily "determined two things, viz.: the amount to be "realized and the property specially benefited "by the expenditure of that amount. The lands "might have been benefited by the improvement "and so the legislative determination that they "were and to what amount or proportion of the

"cost, even if it may have been mistakenly unjust,
"is not open to review. The question of special
"benefit and the property to which it extends is of
"necessity a question of fact, and when the Legis-
"lature determines it in a case within its general
"power, its decision must, of course, be final.
"We can see in the determination reached possible
"sources of error and perhaps even of injustice,
"but we are not at liberty to say that the tax on
"the property covered by the law of 1881 was
"imposed without reference to special benefits.
"The Legislature practically determined that the
"lands described in that act were peculiarly
"benefited by the improvement to a certain
"specified amount which constituted a just pro-
"portion of the whole cost and expense; and
"while it may be that the process by which
"the result was reached was not the best at-
"tainable and some other might have been
"more accurate and just we cannot for that reason
"question an enactment within the general legis-
"lative power. That power of taxation is unlim-
"ited, except that it must be exercised for a
"public purpose. Weissner against Douglass, 64
"N. Y. 91."

Spencer *vs.* Merchant, 100 N. Y. 587,
quoted at 125 U. S., 352.

A leading case is that of Davidson against New Orleans, 96 U. S. 97, in which an assessment of certain real estate in New Orleans for draining the swamps of that city was resisted in the State Courts, and by writ of error brought to this Court upon the ground that the proceeding deprived the owner of his property without due process of law.

Various important questions were considered, among others some of which are very relevant to the present proceeding.

In speaking of the alleged errors in the proceeding this Court said that two of these alleged errors were:

That the price so fixed was exorbitant:

That there may be a surplus collected under the assessment beyond what is needed for the work which must in that case go into the City Treasury.

And the Court said:

"Can it be necessary to say that if the work "was one which the City had authority to do and "pay for it by assessment on the property benefited "that on such questions of method and detail as "these the exercise of the power is not regulated "or controlled by the Constitution of the United "States.

"Of a similar character is the objection much "insisted on, that under the statute the assessment "is actually made before instead of after the work "is done. As a question of wisdom—of judicious "economy—it would seem better in this as in "other works which require the expenditures of "large sums of money to secure the amounts of "payment before becoming involved in the enter- "prise, and if this is not due process of law, it "ought to be. * * *

"It is also said that part of the property of "plaintiff which was assessed is not benefited by "the improvement. This is a matter of detail "with which this Court cannot interfere if it were "clearly so."

Davidson *vs.* New Orleans, 96 U. S., 100, 106.

The case of Davidson *vs.* New Orleans has been frequently cited and follow, as for instance in Bauman *vs.* Ross, 167 U. S., 548, 595.

In a subsequent case Fallbrook Irrigation District *vs.* Bradley, 164 U. S. 112, this Court also considered the application of the fourteenth amendment to a question similar to the present one.

That action was based upon a sale of land made by the collector for the non-payment of an assessment upon such land under an act incorporating an irrigation district. The assessment was sought to be set aside and other relief was asked.

This Court said among other things:

> "It is insisted that the basis of the assessment "upon the lands benefited for the cost of the con- "struction of the works is not in accordance with "and in proportion to the benefits conferred by the "improvement and therefore there is a violation "of the Constitutional amendment referred to and "the taking of the property of a citizen without "due process of law.
>
> "Although there is a marked distinction be- "tween an assessment for a local improvement "and the levy of a general tax, yet the former is "still the exercise of the same powers as the lat- "ter, both having their source in the sovereign "power of taxation. Whatever objections may be "urged to this kind of an assessment as being in "violation of the State Constitution, yet as the "State Court has held them to be without force "we follow its judgment in that case and our at- "tention must be directed to the question whether "any violation of the Federal Constitution is "shown in such assessment. * * * Assume "that the only theory of these assessments for "local improvements upon which they can stand "is that they are imposed on account of the bene- "fits received, and that no land ought in justice

" to be assessed for a greater sum than the bene-
" fits received by it, yet it is plain that the fact of
" *the amount of benefits is not susceptible of that ac-*
" *curate determination which appertains to a demon-*
" *stration in geometry.* Some means of arriving at
" this amount must be used and the same method
" may be more or less accurate in different cases
" involving different facts. Some choice is to be
" made, and where the fact of some benefit accru-
" ing to all the lands has been legally found can it
" be that the adoption of an *ad valorem* method
" of assessing the lands is to be held a violation of
" the Federal Constitution. It seems to us clearly
" not. It is one of those matters of detail in ar-
" riving at the proper and fair amount and propor-
" tion of the tax that is to be levied on the land
" with regard to the benefits it has received
" which is open to the discretion of the State
" Legislature, and with which this Court
" ought to have nothing to do. The way
" of arriving at the amount may be in some in-
" stances inequitable and unequal, but that is far
" from rising to the level of the constitutional
" problem and far from a case of taking property
" without due process of law * * *

" The method of assessment here provided for
" may not be the best which could have been
" adopted in order to accomplish the most equal
" and exact justice which the nature of the case
" permits, but none the less we are unable to say
" that as it runs counter to any provision of the
" Federal Constitution we must for that reason
" hold the objection here considered to be un-
" tenable."

Fallbrook Irrigation District *vs.* Bradley,
164 U. S., 176–178.

It is submitted that on application of the principles laid down in the cases cited under this point show that even if the City charged interest at a greater rate in a particular case than it paid for money borrowed on its assessment bonds it would not follow that an act which in a particular case brought about such a result was unconstitutional.

It is to be borne in mind that the City has merely followed an act of the Legislature in including interest. The only error it has made, if any, is, as we have shown above, in not computing interest for so long a period as it could have done legally.

Under the law the City constructs the improvement, in the first instance, at its own expense, and when the total amount of the expense, including interest, charges and various items, has been ascertained, the City reimburses itself through an assessment upon the property deemed benefited by the improvement.

That is to say, the City, in the case of a particular improvement, advances from time to time to the contractor, and for other expenses, large sums of money which it does not receive back again into the City Treasury, frequently for long periods of time. It is impossible to determine exactly when the work will be finished, exactly what the cost will be, or exactly when the assessment can be imposed. There is frequently litigation as to the amount which should be assessed, and with the property-owners whom it is proposed to assess, and numerous difficulties and delays, so that it frequently happens that through no fault of the City officers, many years intervene between the payment of money for an improvement and the collection thereof by the City. In many cases it would not be just even if it were legal to charge the property-owners with interest, nor as matter of fact is it done.

In the present case, payments were made to the contractor at various times in 1896 and in 1897. The assessment, however, was not confirmed until 1900. There was thus a period of three or four years intervening between the payment of the money to the contractor and the laying of the assessment. To protect the City from loss of interest the statute provides that there shall be added to the assessment an amount for interest which is to be calculated at the legal rate upon the various advances to the contractor to a day sixty days after the date of the interest certificate. As a matter of fact, the City has charged in this case only $1,409.35 more than three per cent. interest on its advances, as we have shown above.

It is to be remembered that some general principle must be adopted. The Legislature does this by prescribing a general reasonable rule to be followed. It is, no doubt, the theory of the law that work of this character is done by the City as a sort of agent or trustee for the property-owners, and that they are entitled to insist that the work shall be done at a reasonable cost to themselves. But it is to be remembered that there are numerous expenses that the City is put to that are not charged for in the assessment—as already stated, for instance, the salaries of the assessors and their clerks, room rent, advertising and many expenses that might be specified.

These expenses cannot always be known to a cent beforehand, so it is necessary to lay down some general rule that will work substantial justice. The rate at which the City can borrow money varies from day to day as well as from year to year, and it would be impracticable to levy assessments if all the varying circumstances had to be examined before an assessment could be imposed.

The rate even at which the City borrows money changes from time to time, according to the money market. A few City bonds bearing seven per cent. interest are still outstanding.

The amount of assessment work is so vast in New York City, and the difficulties and delays growing out of litigation and collection so great that it is impracticable to borrow money on account of each particular improvement, but a running account is kept, payments being made to contractors for all assessment work out of one fund known as the Street Improvement Fund, into which are also paid the collections of all assessments for street improvements.

It is also to be remembered that the Street Improvement Fund exists by virtue of Statute Law and the payment of the interest as well as the assessment itself into that fund and payments out of the said fund are regulated by statute.

> *See Consolidation Act, secs.* 144, 150, *revised in Greater New York Charter, sec.* 181.

In the early days the City's agents collected from the property-owners thought to be benefited by a projected improvement the estimated cost thereof before the work was done, so that the City was in possession of the money to pay for it before the actual improvement was begun.

Later, as such works became more numerous, the City was allowed to borrow the money on account of the property-owners for each particular work.

Later still, the Street-Improvement-Fund system came into operation.

Through the whole history of the systems of local assessments in this State the idea runs that certain

improvements should be paid for by the particular locality benefited and not by taxation of the people at large; that not only the cost proper of the work but also all expenses, outlays and disbursements should be borne by the locality. That is, the City should be reimbursed and made whole. To include some small charge to cover incidental expenses that could not be foreseen, and to allow for unavoidable delays, and under an act of the Legislature, would be only a reasonable means of bringing about the result intended, to wit, an entire reimbursement of the City.

There are many New York decisions sustaining such additions to the amounts assessed:

Matter of Tappan, 54 Barb., 225:

In this case the question was as to the propriety of including in the assessment a charge for making the same. The following is from the opinion of the Court:

> "I am not satisfied that the charge for making "assessments is illegal. The Common Council "are authorized to assess the cost of a "local improvement upon the property bene- "fited thereby. The fees of the officers who "do this duty are a part of the cost of the work. "These officers are now paid by a salary from the "City treasury. *It is just that the expenses of an "office created for and having no other duty to per- "form than to assess the cost of those improvements "upon the lands which ought to pay therefor should "be paid as the other expenses are paid.* It appears "that the salaries of these officers are over $7,000 "per year, but it does not appear what further ex- "pense is incurred by the City in relation to the "office. It does not, therefore, appear that any "greater sum has been charged than the actual "expense to the City in making the assessments.

"It has been repeatedly held by this Court that "an assessment will not be set aside because the "charge for assessing is contained in it."

Matter of Pelton, 85 N. Y., 651:

The following is from the opinion of the Court in that case:

"The objection to the items for surveyors' fees "is not tenable. *The mode of ascertaining these "expenses may not produce the exact cost of this item "of the work, but it approximates the actual expendi-"ture, and seems to be the only practical method of "ascertaining it*, and it does not appear that the "charge in this case is in excess of the sum prop-"erly chargeable to this work."

Matter of Lowden, 89 N. Y., 548:

In that case the petitioner claimed that the assessment should be reduced by deducting a proportionate part of surveyors' fees. It appeared from the evidence that the item for surveyors' fees was made up under the supervision of the Chief Engineer, and included all his expenses incidental to the construction of the sewer. He was unable to state the separate items, but said that the sum was arrived at by taking such percentage of the work, compared with the whole amount of similar work relating to sewerage of the City done during the year, as would remunerate the City for the moneys advanced for engineers' expenses, making up maps, plans and surveys. The engineers were employed at a fixed salary, which had already been paid from moneys advanced from the Finance Department in view of collecting the amount from the property.

The following is from the opinion of the Court of Appeals in that case:

"We think so much of the appeal in behalf of "the City as relates to the disallowance of survey-

" ors' fees is well taken. The petitioner does not
" object that the assessment may not properly in-
" clude surveyors' fees. In view of the suggestion
" of this Court in Matter of Merriam, 84 N. Y., 596,
" and its decision in Matter of Pelton, 85 *id.*, 651,
" such objection would be of no use ; but he objects
" that it does not appear that the sum named ' was
" ' expended for that purpose.' *It is not apparent*
" *that there is any other prescribed method of arriv-*
" *ing at the amount of these assessments. Indeed, it*
" *appears from the evidence that there is no other*
" *mode. A comparison of the case in hand with Mat-*
" *ter of Fulton shows that upon this point the cases*
" *are alike. We there held, upon evidence quite like*
" *that now before us, ' that although the mode of as-*
" *' certaining these expenses may not produce the ex-*
" *' act cost of this item of work,' yet, as it approxi-*
" *mates thereto, and the charge did not appear to be*
" *in excess of the sum properly chargeable to the*
" *work, the objection was not tenable.*

" *Nor does it appear, in the case before us, that the*
" *share imposed upon the petitioner was exaggerated,*
" *or that under the system of public improvement*
" *imposed by law upon the property-owner in the*
" *City of New York it could be admeasured in any*
" *better way, or one more just to him or the public.*
" The fact that the engineers by whom the work
" was done were already in the employ of the City
" is relied upon by the petitioner to distinguish
" this case from Matter of Pelton. It might be in-
" ferred from the evidence that the same fact
" appeared there, but however that may be, the
" scheme of sewer improvements contemplates that
" the whole expense should be borne by the prop-
" erty benefited, and no part of it by the City (*In*
" *re* Eager, 46 N. Y., 100). And whether the serv-
" ice is rendered by an engineer employed for the

" special work by the Department in charge of it,
" or by one employed by the City generally, can
" in nowise affect the burden imposed upon the
" lot-owner."

Matter of Lowden, 89 N. Y., 553.

The propriety and legality of including in the assessment certain items of expense is further illustrated by the cases of

Matter of Eager, 46 *N. Y.*, 100 ;
Matter of Merriam, 84 *N. Y.*, 607 ;
Matter of Johnson, 103 *N. Y.*, 260 ;
People ex rel. *Stow* vs. *Common Council of Kingston*, 39 *App. Div.*, 80.

That the actual cost of the improvement is not necessarily the extent of the benefit has been held by this Court.

Parsons *vs.* District of Columbia, 170 U. S., 45.

FOURTH POINT.

As to the argument of plaintiff in error.

The contention of plaintiff in error in the State Courts was directed mainly to the proposition that an assessment for a local improvement must be founded on benefit; that if laid without regard to benefit or in excess of benefit it would be illegal because resulting in the taking of private property without due process of law.

We entirely agree with him on this general proposition, and the cases which he cites we act upon and follow every day, but they do not, we think, sustain his contention in the present case.

If he had proved that the assessment was in excess of the benefit derived from the construction of a sewer, or was apportioned among the parcels assessed without

regard to benefit, the cases which he cited would be in point to show that the assessment is iliegal, but there is no such error shown or claimed to have been shown.

Defendant in error has attempted to meet the contention of plaintiff in error by showing that some general practicable rule for ascertaining the amount of such expenses is all that the law requires, and that it is not necessary that it should appear affirmatively that every cent included in the assessment has been actually expended by the City on the particular improvement (see *Matter* of *Tappen*, *Lowden* and *Pelton*, cited under our third point).

We suppose that an act would be constitutional which provided that the City might add, say ten per cent. of the actual cost of a particular improvement to the assessment in order to compensate it for the general expense of, so to speak, carrying on the assessment business, and that there would be nothing unconstitutional in such an act unless the resulting assessment was more than the benefit derived from the improvement by the property assessed.

The City may be regarded as a corporate agency engaged in the business of constructing street improvements on account of and for the benefit of certain property-owners. It necessarily maintains an expensive plant for the purpose, the cost of which is not included in the assessments. The City is frequently put to the expense of costly litigation and sometimes to the loss of entire assessments because of technically illegal action as well as individual delays in the receipt of money payable from assessments.

It keeps, as required by statute (Consolidation Act, sections 144, 150, now section 181 of Greater New York Charter), a running account under the head of "Street Improvement Fund," into which is paid assessments that are collected, and out of which is paid to

contractors money which may be due them for constructing various street improvements. When the fund is inadequate it is replenished by the sale of assessment bonds.

It seems to us clear that there would be nothing unjust and nothing unconstitutional in allowing the City to reimburse itself by some additional charge to insure it against unforeseen losses through no fault of its officers.

As an instance where this principle was approved, we cite the case of *Suarez* vs. *The Mayor, etc.*, 2 Sandf. (N. Y.), 173, where the City was allowed to retain for its own use interest or moneys it had received in its capacity of public administrator "as a compensation for its safe keeping and proper distribution when called for."

It is as much the theory of the law in regard to assessments for local improvements in the State that a municipality shall be reimbursed for all reasonable expenses to which it is put as that it shall not charge the property-owners with unnecessary expenses resulting from its own carelessness or neglect.

(1) The petitioner is in reality attacking not the constitutionality of the statute but the wisdom of the Legislature in enacting the same. But this question, we take it, the Court will not pass upon. To do so would be an invasion of the province of the State Legislature.

The position of the City is this: It has strictly followed the statute, and hence the petitioner has no standing in court unless the statute is unconstitutional. The most that the petitioner can claim is that the scheme provided by the Legislature has resulted in a charge of some $235 (about five per cent.) more than what might have been imposed if some other scheme

had been adopted. Granting this for the sake of argument, it does not follow that the act is unconstitutional.

FIFTH POINT.

Cases cited by plaintiff in error.

A few of these may be noticed.

Stuart vs. *Palmer*, 74 N. Y., 183, is one of the leading authorities in New York establishing the proposition that a law imposing an assessment for a local improvement without notice, and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed has the effect of depriving him of his property without due process of law, and is therefore unconstitutional. No such question is or can be raised in the case now before the Court. If necessary, it would be easy to show that the statute under which this assessment was laid provides ample opportunities for hearings.

Norwood vs. *Baker*, 172 U. S., 269, has been already noticed, and is an authority for defendant in error.

Mayer vs. *The Mayor*, 101 N. Y., 284, was cited as an authority for plaintiff in error.

This was a case where $165,632.40 had been included in a street-opening assessment for Commissioners' fees and expenses.

The City claimed that this item for Commissioners' fees and expenses was excessive, and succeeded in effecting a settlement whereby a reduction of $97,531.82 was saved. The plaintiff was one of the parties assessed, and his claim was that he was entitled to have

applied upon or deducted from his assessment the proper proportion of the amount saved by the City, and this was held to be correct.

This was merely holding that the City, as the plaintiff's agent, working in his employment and for his benefit, had succeeded in obtaining a reduction of the amount claimed against the plaintiff, and the principal should have the benefit of the saving and the agent should not be allowed to put the money in his own pocket.

Two cases were cited in the State court by plaintiff in error which may need examination. The first was that of Doyle *vs.* Austin, 47 Cal., 353.

It is not seen how this case has any relation to the theory of plaintiff in error.

There was an assessment for a public street, the expense of which was paid by the issue of bonds.

The bonds to pay for the improvement were sold at a discount.

The Court held that the interest to accrue on the bonds, and the discount suffered in converting them into cash were incidental expenses and should be charged upon the property benefited, and that in such a case the property was only charged with the cost of the improvement.

So far as this case has relation to the present one, it is decidedly in favor of the theory of the defendant in error and not of that of plaintiff in error.

Another case cited was State *vs.* City of Elizabeth, 37 N. J. Law, 142.

This case, too, has no application to the present one. Bonds had been sold by a city to raise money in antic-

ipation of a street improvement. The proceeds were devoted by the City to other purposes, and when the time came to pay for the improvement there were no funds available.

The Court held that inasmuch as the funds derived from the bonds had been used for other purposes, it was not lawful to include the interest thereon in the estimate of the improvement to be assessed on the land owners.

This of course would seem to be an elementary proposition.

The Court found no fault with, on the contrary it approved, the sale of these bonds in anticipation of the making of the improvement.

This case has little application to the present one, but also, so far as it does apply, tends to sustain the rules invoked by defendant in error.

SIXTH POINT.

The "legal rate" payable on the installments paid to the contractor is six per cent.

The argument was advanced below that "legal rate of interest" means 4 per cent. and not 6 per cent.

This is very easily answered.

The statute which we have quoted in full on page 6 of this brief provides that the amount of the assessment is the sum of two certificates:

(1) A certificate "of all the expenses which shall "have been actually incurred" by the City.

(2) A certificate of "*the amount of interest at the legal* "*rate* upon the several installments advanced," etc.

The words italicized are not ambiguous. Their plain meaning, we think, is that interest should be calculated at the legally established rate of interest in the State of New York; that is, 6 per cent.

The New York statute as to the legal rate is as follows:

> "*Rate of interest to be six per cent.* Section 1. "The rate of interest upon the loan or forbearance "of any money, goods or things in action shall be "six dollars upon one hundred dollars for one "year, and after that, a rate for a greater or less "sum or for a longer or shorter time. But nothing "herein contained shall be so construed as to in "any way affect any contract or obligation made "before the passage of this act" (amended by Laws of 1879, chap. 538), (Revised Statutes, part 2, chap. 4, title 3, sec. 1).

The statute, as to interest certificates, had its origin in Laws of 1880, chapter 556, section 5. It was re-enacted in the Consolidation Act (chap. 410, Laws of 1882) as section 868, and again in the Greater New York Charter, as section 946.

The expression "*interest at the legal rate*" has remained unchanged from the original statute of 1880 down to the present time. The Legislature, by Laws of 1879, chapter 538 (to take effect January 1, 1880), had reduced the legal rate from 7 to 6 per cent., thereby amending the New York Revised Statutes.

The statute as to the interest certificates was enacted only a few months after the Act of 1879, establishing the legal rate of interest at 6 per cent., went into effect, and naturally should be construed in connection therewith.

The petitioner's counsel claims, however, that because in section 181 of the present New York Charter assessment bonds must not be sold for less than par, and bearing interest at a rate not exceeding 4 per centum, the legal rate in this case is 4 per cent.

He has been arguing just before, however, that only 3 per cent. should be charged because the City was able to borrow money on assessment bonds at 3 per cent.

We showed, however, above, that if interest had been calculated in this case at 3 per cent., the amount thereof would have been $6,428.98. If calculated at 4 per cent the amount would have been one-third more, or $2,142.66, making the total interest chargeable on a 4 per cent. basis.....	$8,570 64
The amount actually charged was.....	7,837 33
The difference is.....	$733 31

That is $733.31 less than 4 per cent. has been charged. In other words,less than what he admits is legal has been charged, and hence if his contention on this point were correct, his client has been charged less than the law allowed and has no grievance.

In the corresponding section of the Consolidation Act (Laws of 1882, chap. 410, sec. 144), the rate of interest on assessment bonds was fixed at 6 per cent., and this act was in force when the contract in this case was let and during all the time when the City was paying the contractor by installments.

Going back still further the rate was 7 per cent., as established by Laws of 1852, chapter 397, which was in force for a long time certainly, and perhaps down to

the enactment of the Consolidation Act (see Laws 1872, chap. 580).

The construction contended for by the counsel for the petitioner thus rests upon a constantly shifting basis. If he relies upon the statute as to assessment bonds, his basis has shifted from 7 per cent. to 6 per cent., and then to 4 per cent., and his argument would require that it ought to be shifted to 3 per cent.

If he relies upon the rate at which the City can borrow money, his basis is still more shifting. It appears that the City borrowed money at 3 per cent. on its assessment bonds, but this rate continually changes according to the money market. City bonds bearing interest at all rates from 7 per cent. to 2½ per cent. are in existence.

We doubt whether the system now in operation could be worked at all if the City had to charge the exact amount of interest at which it borrowed the money which, through the Street Improvement Fund, was used in paying the contractor.

SEVENTH POINT.

The writ should be dismissed, or if this Court deems it proper to review the decision of the State Courts, then the decision of those Courts should be affirmed.

New York, November 10, 1902.

GEORGE L. RIVES,
Corporation Counsel,
For Defendant in Error.

THEODORE CONNOLY,
GEORGE L. STERLING,
Of Counsel.

APPENDIX.

Being a Reference to, and Quotations from, Certain Statutes of the State of New York.

The provisions of the New York State Statutes that have a bearing upon the subject are as follows:

THE CONSOLIDATION ACT.

This statute, which was chapter 410 of the Laws of 1882, was in force until January 1, 1898, and sections 144 and 150 were applicable herein to all matters occurring before that date, namely, to the status of the Street Improvement Fund as then existing, out of which the installments due on the contract for the improvement were paid.

These sections are as follows:

Amount of Bonds that May be Issued and Rate of Interest.

"Section 144. It shall be lawful for the mayor, aldermen and commonalty to borrow from time to time, by the issue of bonds, bearing such rate of interest as they may deem proper not exceeding six per centum per annum, such sums as may be necessary to pay all expenses incurred or to be incurred on account of regulating and paving streets, building sewers, and all other work ordered to be done by contract, under and by virtue of ordinances passed by the said mayor, aldermen and commonalty, the expense whereof is to be afterward collected by assessment from the property benefited by said work or works, or on account of any local improvement or other public work heretofore made or performed, or that shall be hereafter made or performed under and by virtue of the authority of any law in all cases in which the said expense is to be paid

in whole or in part by assessment upon the property benefited. Such bonds shall be issued by the comptroller, when authorized by the board of estimate and apportionment, at not less than par, for such period as said comptroller may determine, not exceeding ten years. No moneys shall be paid out of the proceeds of said bonds on account of any contract hereinbefore referred to, until a copy of said contract has been filed with the comptroller of said city by the head of the department having such work in charge, and also a certificate in writing from the head of such department, stating that a payment is due, and the amount of such payment. On work contracted for subsequent to May seventh, eighteen hundred and seventy-two, or hereafter contracted for, no interest shall be charged on the monthly or other intermediate payments to any contractor, and thirty per centum, and no more, shall be reserved from the amount or value of work specified and certified from time to time to the comptroller of said city by the proper officer to have been done by any contractor; and such reserved thirty per centum shall be paid to such contractor on or before the expiration of thirty days from the completion and acceptance of the work (as amended by Laws 1884, chap. 455, p. 529)."

"*Borrowing authorized to meet deficiencies in arrears of assessments.*

"Section 150. The corporation of the city of New York is hereby authorized to borrow, on the credit of the corporation, from time to time, such amounts as may be required to meet the deficiencies caused by delay in collecting arrears of assessments; the aggregate amount so borrowed not to exceed at any time the aggregate amount of said arrears then outstanding."

The Greater New York Charter.

This statute in the form applicable to this litigation is chapter 378 of the Laws of 1897, and is printed as the third volume of the Session Laws of the State of New York for the year 1897. This statute is a codification of the various special and local laws applicable to the City of New York after consolidation with the City of Brooklyn and other municipal corporations in the vicinity. This statute is divided into chapters, titles and sections. Chapter XVII. of the statute relates to taxes and assessments and the sections of this chapter are numbered from 884 to 1054. The assessments with which we have to deal are for local improvements other than those confirmed by a court of record. The other classes of assessments which are confirmed by a court of record arise from the exercise of the right of eminent domain in taking property for public uses, generally for the opening, widening and extending of streets.

The provisions as to local assessments other than those confirmed by a court of record, being the ones with which we are now dealing, are contained in title 2 of said chapter XVII, and in sections 942 to 954. The provisions as to vacating and modifying this class of assessments are contained in title 3 of said chapter, in sections 958 to 964. It is under the provisions of this title that the proceeding now before the Court is instituted.

Before giving the sections specially relating to assessments, it is, perhaps, advisable to quote section 181 of the Charter, claimed by the plaintiff in error to be relevant, but which was not enacted until January 1, 1898, after all the installments due the contractor had been paid to him.

"*Assessment bonds.*

"Section 181. It shall be lawful for the comptroller, when authorized by the board of estimate and apportionment to issue assessment bonds, at not less than par, for such periods as said comptroller may determine, not exceeding ten years, and bearing interest at a rate not exceeding four per cent. per annum, to provide the means necessary to pay all expenses incurred or to be incurred on account of regulating and paving streets, building sewers, and all other work ordered to be done by contract, by virtue of ordinances which may be hereafter passed by the municipal assembly of the city of New York, the expense whereof is to be collected by assessment from the property benefited by said work or works, or on account of any local improvement or other public work heretofore made or performed, or that shall hereafter be made or performed under and by virtue of the authority of any law in all cases in which the said expense is to be paid in whole or in part by assessment upon the property benefited. No moneys shall be paid out of the proceeds of said bonds on account of any contract hereinbefore referred to, until a copy of said contract has been filed with the comptroller of said city by the head of the department or board having such work in charge, and also a certificate in writing from the head of such department or board, stating that a payment is due and the amount of such payment. On work contracted for subsequent to May seventh, eighteen hundred and seventy-two, or hereafter contracted for, no interest shall be charged on the monthly or other intermediate payments to any contractor, and thirty per centum, and no more, shall be reserved from the amount or value of work specified and certified from time to time to the comptroller of said city, by the proper officer, to have been done by any contractor; and such reserved thirty per centum shall be paid to such contractor on or before the expir-

ation of thirty days from the completion and acceptance of the work.

"The fund heretofore created by the corporation known as the mayor, aldermen and commonalty of the city of New York, known as the street improvement fund, shall be continued, and into such fund shall be paid the proceeds of the sale of assessment bonds as by this section authorized, and of such bonds as may by other provisions of law be authorized to be issued for similar purposes within the territory of the city of New York, as hereby constituted, and for the payment of the expense of which the said city may in the first instance become liable, as well as the cash balances of assessments already collected, or to be hereafter collected, on account of similar contracts duly entered into by the proper authorities of the several municipal or public corporations, or parts thereof, which by this act are consolidated with the corporation known as the mayor, aldermen and commonalty of the city of New York."

The assessment sections of the Charter, so far as relevant, are as follows:

CHAPTER XVII.

TITLE 2.

"ASSESSMENTS FOR LOCAL IMPROVEMENTS OTHER THAN THOSE CONFIRMED BY A COURT OF RECORD.

"*Assessment; term how construed.*

"Section 942. The word assessment, wherever used in this title and in the next succeeding one, shall be construed to mean an assessment for any local improvement which may be lawfully confirmed in any other manner than by a court of record.

"*Mayor to appoint a board of assessors; salary; subordinates.*

"Section 943. The mayor shall appoint five persons, who shall constitute the board of assessors. The salary of each member of said board shall be three thousand dollars a year. The said board shall be charged with the duty of making all assessments, other than those required by law to be confirmed by a court of record, for local improvements, for which assessments may be legally imposed in any part of the city of New York as hereby constituted. The said board shall appoint a secretary and such clerks and subordinates as may be necessary, and shall fix their salaries, not exceeding in the aggregate the appropriation made for such purpose in the final estimate.

"The secretary, clerks and subordinates of the board of assessors of the mayor, aldermen and commonalty of the city of New York shall be and act as secretary, clerks and subordinates of the board of assessors herein provided for until and unless they shall be removed or superseded by the last-mentioned board of assessors.

"*The board of revision of assessments.*

"Section 944. The controller, corporation counsel and president of the board of public improvements shall constitute the board of revision of assessments. The said board, or a majority thereof, shall have and perform all the powers and duties relative to the revision, correction and confirmation of assessments specified in the various laws and ordinances relating to assessments in any part of the city of New York, as hereby constituted, other than assessments made by commissioners appointed by a court of record, and other than those confirmed by the board of assessors; said board shall have power to consider, on the merits, all objections made to any such assessment, and to sub-

pœna and examine witnesses in relation thereto, and to confirm said assessment, or to refer the same back to the board of assessors for revisal and correction in such respects as it may determine. The revision of such assessment shall be made without delay, so that unless the same are referred back for revisal and correction they shall be confirmed within thirty days from the time they shall, respectively, be presented for confirmation, and if not so confirmed or referred back they shall be deemed to be confirmed at the expiration of thirty days from the time they shall be, respectively, so presented for confirmation. All such assessments, immediately upon confirmation, shall be transmitted to the controller for entry and collection."

"*Powers of the two boards.*

"Section 945. In addition to the powers herein specifically conferred upon the board of assessors and the board of revision, the said boards shall have and exercise, as to the whole territory embraced in the city of New York, each and every power and authority conferred upon and exercised by the board of assessors, and the board of revision and correction of assessments, respectively, of the corporation heretofore known as the mayor, aldermen and commonalty of the city of New York."

"*Certificates on which assessments are made.*

"Section 946. All assessments shall be made by the board of assessors on the following certificates, to wit.:

"1. The officer or head of the board or department charged with the execution of the work in question, shall certify to the board of assessors the total amount of all the expenses which shall have been actually incurred by the city of New York on account thereof.

"2. The controller shall certify to the board of assessors the amount of the interest, at the legal rate, upon the several installments advanced or payments made on account of such work, from the time of such payment or advance, by the city, to a day sixty days after the date of such certificate. Thereafter the board of assessors shall assess upon the property benefited, in the manner authorized by law, the aggregate amount of such certificates, or such proportion thereof as is authorized by law, and the said board shall not in any way be enjoined, restrained, hindered or delayed in the performance of this duty, provided that nothing contained in this section shall be construed to affect the powers of the board of revision of assessments."

"*Notice of completion of assessments to be given.*

"Section 950. It shall be the duty of the board of assessors, when it has completed any proposed assessment, to give notice of the fact and that it is proposed to lay the same to the owner or owners; such notice shall be published daily in the 'City Record,' and the corporation newspapers, for at least ten days successively. The notice shall describe the limits within which it is proposed to lay the said assessment, and shall contain a request for all persons whose interests may be affected thereby, and who may be opposed to the same, to present their objections, in writing, to the secretary of the board of assessors within thirty days from the date of such notice, and specifying a time and place after the expiration of the said thirty days when and where the said objections will be heard and testimony received in reference thereto. If, after hearing and examining such objections and testimony, the assessors shall not deem it proper to alter their assessment, or having altered it there shall still be objections to the same, it shall be their duty to present

such objections with the proposed assessment to the board of revision of assessments.

"If no objections shall be received, or if the board of assessors shall alter the assessment so as to satisfy the objectors, said board shall forthwith declare the said assessment confirmed, and shall transmit the same to the controller for entry and collection.

"An assessment so confirmed shall be of the same force and effect as if confirmed by the board of revision of assessments."

"TITLE 3.

"VACATING AND MODIFYING ASSESSMENTS FOR LOCAL IMPROVEMENTS OTHER THAN THOSE CONFIRMED BY A COURT OF RECORD.

"*Remedies Limited.*

"Section 958. No suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title; but owners of property shall be confined to their remedies in such cases to the proceedings under this title."

"*Petition to the Supreme Court in case of fraud or substantial error.*

"Section 959. If in the proceedings relative to any assessment or assessments for local improvements, or in the proceedings to collect the same, any fraud or substantial error shall be alleged to have been committed, the party aggrieved thereby may apply to a justice of the supreme court in special term or in vacation, who shall thereupon, upon due notice to the corporation counsel, proceed forthwith to hear the proofs and allegations of the parties. If, upon such

hearing, it shall appear that the alleged fraud or substantial error, other than such errors as are specified in the next section, has been committed as provided in this title, the said assessment shall be vacated or modified, and the lien created thereby, or by any subsequent proceedings, shall cease. If, upon such hearing, it shall appear that, by reason of any alleged irregularity, the expense of any local improvement has been unlawfully increased, the judge may order that such assessment upon the lands of said aggrieved party be modified by deducting therefrom such sum, as is in the same proportion to such assessment as is the whole amount of such unlawful increase to the whole amount of the expense of such local improvement. Any order that may be made by a justice under authority of this section shall be filed in the office of the county clerk of the county in which the lands are situated, and after the filing of a certified copy thereof with the officer having charge of the assessment, it shall be his duty to cancel or reduce the assessment, as required by the order, or do any other act required thereby."

"*Assessments not to be set aside for certain irregularities and technicalities.*

"Section 960. No assessment heretofore made or imposed, or which shall hereafter be made or imposed for any local improvement or other public work, already completed or now being made or performed, or which shall hereafter be made, done or performed, shall hereafter be vacated or set aside for or by reason of any omission to advertise, or irregularity in advertising any ordinance, resolution, notice, or other proceeding relative to or authorizing the improvement or work for which such assessment shall have been made or imposed or for proposals to do the work, or for or by reason of the omission of any officer to perform any

duty imposed upon him, or for or by reason of any defect in the authority of any department or officer upon whose action the assessment shall be in any manner or to any extent dependent, or for or by reason of any omission to comply with or carry out any detail of any law or ordinance, or for or by reason of any irregularity or technicality, except only in cases in which fraud shall be shown and in case of an assessment for repaving any street or public place, upon property for which an assessment has once been paid for paving the same street or public place; and all property in said city benefited by any improvement or other public work already completed, or now being made or performed, and hereafter made, done or performed, except as aforesaid, shall be liable to assessment for such improvement or work and all assessments for any such improvement or other public work shall be valid and binding notwithstanding any such omission, irregularity, defect in authority or technicality. No assessment shall be vacated by reason of fraud or irregularity in the proceedings to collect the same by sale of the assessed premises; but upon proof of such fraud or irregularity, such sale shall be set aside and the respective rights and liabilities of the assessed person and of the city of New York shall become and be the same as if such sale had not been made."

"*Power of court to vacate or reduce assessments limited and qualified.*

"Section 962. No court shall vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property for any local improvements, otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such as-

sessment, which is equivalent to the fair value or fair cost of any local improvement, with interest at the rate of three per centum per annum from the date of confirmation to the date of the final order of reduction, and seven per centum thereafter, be disturbed for any cause.

"The provisions of this section shall apply to actions to recover money paid for assessments, and the amount recovered shall be limited to the excess over the fair value or fair cost of the improvement."

" *When proceeding to vacate, etc., to be brought.*

"Section 963. All proceedings to vacate or reduce assessments in the city of New York must be brought within one year after the confirmation thereof."

" *Taxes, assessments and water rents to be liens.*

" Section 1017. All taxes and all assessments for local improvements, and all water rents, and the interest and charges thereon, which may, in the City of New York, as by this act constituted, hereafter be laid or may have heretofore been laid, upon any real estate now in said city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges. No assessments for any local improvement shall be deemed to be fully confirmed, so as to be due and be a lien upon the property included in the assessment, until the title thereof, with the date of confirmation shall be entered with the date of such entry, in a record of the titles of assessments confirmed, to be kept in the office of the collector of assessments and arrears."

" *Notice of confirmation of assessments to be published.*

" Section 1018. It shall be the duty of the comptroller to give public notice, by advertisement, for at

least ten days, in the 'City Record' and the corporation newspapers, duly designated, for any borough in which the property is situated, immediately after the confirmation of any assessment for a local improvement, that the same has been confirmed, specifying the title of such assessment, and the date of its confirmation, and also the date of entry in the record of titles of assessments kept in the office for the collection of assessments and arrears of taxes and assessments, and of water rents, notifying all persons, owners of property affected by any such assessments, that unless the amount assessed for benefit on any person or property shall be paid within sixty days after the date of said entry of any such assessment, interest shall be thereafter collected thereon as provided in the following section; and all provisions of law or ordinance requiring and different or other notice of assessments and interest thereon, are hereby repealed."

"*Interest to be charged.*

"Section 1019. If any such assessment shall remain unpaid for the period of sixty days after the date of entry thereof on the said record of titles of assessments it shall be the duty of the officer authorized to collect and receive the amount of such assessments to charge, collect and receive interest thereon, at the rate of seven per centum per annum, to be calculated from the date of such entry to the date of payment."

"*Rate of interest.*

"Section 1020. Interest shall hereafter be charged and collected at the rate of seven per centum per annum on all arrears of taxes and assessments returned to the collector of assessments and arrears from the time they become due until the date of payment, or in case a sale has taken place, as provided in section ten hundred and twenty-seven, until the date of the certifi-

cate mentioned in said section, and on the rents and charges for water from the time the taxes become due, to which they may be added as required by section ten hundred and twenty-five, until the same date respectively."

"*Sales of lands for non-payment of taxes and assessments—procedure.*

"Section 1027. Whenever any tax on lands or tenements, or any assessment on lands or tenements for local improvement shall remain unpaid for the term of three years from the time the same shall have been confirmed, and also whenever any rents for water in said city shall have been due and unpaid for the term of four years from the time the same shall have been due, it shall and may be lawful, for the collector of assessment and arrears under the direction of the comptroller to advertise the said lands and tenements or any of them for sale, and by such advertisement the owner or owners of such lands and tenements respectively shall be required to pay the amount of such tax, assessment or water rents so remaining unpaid, together with the interest thereon at the rate of seven per centum per annum to the time of payment, with the charges of such notice and advertisement, to the said collector, and notice shall be given by such advertisement that if default shall be made in such payment, such lands and tenements will be sold at public auction at a day and place therein to be specified, for the lowest term of years at which any person or persons shall offer to take the same in consideration of advancing the said tax, assessment or water rents, as the case may be, and the interest thereon as aforesaid to the time of sale, and the charges of the above-mentioned notices and advertisement and all other costs and charges accrued thereon; and if, notwithstanding such notice, the owner or owners shall refuse or neglect to pay such

tax, assessment or water rents, with the interests as aforesaid, and the charges attending such notice and advertisement, then it shall and may be lawful for the said collector, under the direction of the said comptroller, to cause such lands and tenements to be sold at public auction for a term of years, for the purpose and in the manner expressed in the said advertisement, and such sale shall be made on the day and at the place for that purpose mentioned in the said advertisement, and shall be continued from time to time, if necessary, until all the lands and tenements so advertised shall be sold; and the said collector shall give to the purchaser or purchasers of any such lands or tenements a certificate of sale in writing, describing the lands and tenements so purchased, the term of years for which the same shall have been sold, the sum paid therefor, and the time when the purchaser will be entitled to a lease of the said lands and tenements. But no houses or lots, or improved or unimproved lands, in the City of New York, shall be hereafter sold or leased at public auction for the non-payment of any tax, assessment or water rents which may be due thereon, unless notice of such sale shall have been published once in each week successively for three months in the "City Record" and the corporation newspapers, which advertisement shall contain, appended to said notice, a particular and detailed statement of the property to be sold for taxes, assessments or water rents; or the said detailed statement and description, instead of being published in the "City Record" and the corporation newspapers, shall, at the option of the said comptroller, be printed in a pamphlet, in which case copies of the pamphlet shall be deposited in the office of the said collector, and shall be delivered to any person applying therefor. And the notice provided for in this section to be given of the sale of houses and lots and improved and unimproved lands shall also state that the detailed statement of the taxes, assessments, or

water rents, and the ownership of the property taxes assessed, and on which the water rents are unpaid, is published in the "City Record" and the corporation newspapers, or in a pamphlet, as the case may be, and that copies of the pamphlet are deposited in the office of the said collector, and will be delivered to any person applying for the same. No other notice or demand of the tax assessment or water rent shall be required to authorize the sale of any lands and tenements as hereinbefore provided."

"*Redemption lease to be executed to purchaser.*

"Section 1041. The collector of assessments and arrears, under direction of the comptroller of the city, shall cause an advertisement to be published at least twice in each week for six weeks successively in the 'City Record' and the corporation newspapers, in such form as he shall deem best calculated to give notice of such sale, that unless the lands and tenements sold be redeemed by a certain day, they will be conveyed to the purchaser. If the person or persons claiming title to the said lands and tenements, or some other persons, shall not, within two years from the date of the beforementioned certificate pay to the said collector, for the use of the purchaser or purchasers, his, her or their heirs, executors, administrators, or assigns, the sum mentioned in such certificate, together with the interest thereon, at the rate of fourteen per centum per annum, from the date of such certificate, the said comptroller in the name of the City of New York, at the expiration of the said two years, shall execute to the purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, a lease under the common seal of the city, of the lands and tenements so sold for such term of years as the same shall have been sold, and the execution thereof shall be witnessed by the said collector. At the time of receiving the lease the pur-

chaser shall pay the sum of two dollars and fifty cents to the said collector for the expense of drawing said lease, and also the expense of advertising the notice to redeem; and all such leases executed by the said comptroller and witnessed by the said collector shall be presumptive evidence that the sale and all proceedings prior thereto, from and including the assessments on said lands and tenements, for taxes or assessments or water rents, and all notices required by law to be given previous to the expiration of the two years allowed to redeem, were regular and according to the provisions of the statute in such cases made and provided; and such purchaser or purchasers, his, her or their heirs, executors, administrators, or assigns, shall, in virtue thereof and of this title, lawfully hold and enjoy the said lands and tenements in said lease mentioned for his, her, or their own proper use against the owner or owners thereof, and all claiming under him, her, or them, until such purchaser's term therein shall be fully complete and ended; and the said purchaser or purchasers, his, her, or their heirs, executors, administrators, or assigns, shall be at liberty to remove all the buildings, or materials which he, she, or they shall erect or place thereon during the said term within one month after the expiration of the said term, but leaving the lands and tenements, with the streets fronting the same in the order required by the regulations of the municipal assembly; provided that such lease shall not be executed and delivered until the expiration of six months after the publication of the notice last herein above mentioned."

Supreme Court of the United States.

No. 86.—October Term, 1902.

The Home for Incurables, Plaintiff in Error, vs. The City of New York. } In error to the Supreme Court of the State of New York.

[December 1st 1902.]

The plaintiff in error, The Home for Incurables, filed its petition in the Supreme Court for the City and County of New York, alleging that at the date of the confirmation of a certain assessment for a sewer in East 184th Street from Vanderbilt Avenue west to Washington Avenue, &c., it was the owner of certain lots affected thereby in ward number one, block number 3064, the twenty-fourth ward of the city of New York;

That on the 22d of January 1900 that assessment was confirmed by operation of law and the title thereof duly entered, with date of entry and of confirmation, in the record of titles of assessments confirmed, whereby such assessment became a lien upon such lots; and,

That the assessment, together with an interest certificate certified by the Comptroller of the city of New York to the Board of Assessors, was irregular, excessive and voidable, for reasons set forth in the petition.

The petition alleged among other things that "so much of the act of the Legislature of the State of New York, known as section 868 of the New York City Consolidation Act of 1882, as purports to authorize and direct the making of such interest certificate and the assessment of the amount thereof herein, is in violation of the Constitution of the State of New York in that said portion of said act authorizes the taking of private property without just compensation, and said portion of said act purports to authorize an unlawful exercise of the power of taxation."

The petitioner prayed that the assessment be vacated or reduced, and that the lien or liens created thereby or by any subsequent proceeding be cancelled and discharged or reduced so far as the same affected the above lots.

The case was heard upon the stipulation of facts in the Supreme Court and the relief asked by the petitioner was denied. Upon appeal to the Appellate Division of the Supreme Court the action of the court of original jurisdiction was confirmed. The case was then carried to the Court of Appeals of the State, and the judgment of the lower court was affirmed.

Upon writ of error to this court, it has been assigned for error that the judgment of the State court was in violation of the provisions of the Four-

teenth Amendment of the Constitution of the United States; also, that the judgment deprived the Home of the equal protection of the law and of its property without due process of law.

The record contains a certificate by the chief judge of the Court of Appeals of New York to the effect that in this proceeding the Home for Incurables claimed in the courts of the State that "the imposition of all or a part of the assessment on its land as set forth in the record herein was in violation of the statutes and Constitution of the State of New York and of the provisions of the Fourteenth Amendment of the Constitution of the United States, and constituted a taking of property without due process of law; that the respondent in this proceeding contended that the said assessment was neither in whole nor in part in violation of the statutes and Constitution of the State of New York or of the Constitution of the United States, and also that the said Home for Incurables had no remedy by petition to correct any errors in the said assessment; that this court decided that the said Home for Incurables did have a remedy by petition in the manner and form of the proceeding adopted by it to correct any errors in the said assessment, but that the assessment complained of was valid and without error as to each and every part thereof."

Mr. Justice HARLAN delivered the opinion of the Court.

The plaintiff insists here that the State court, by its final judgment, refused to recognize certain rights belonging to it under the Constitution of the United States. But it does not appear on the face of the record that he set up or claimed any such right until the case reached this court. In *Parmelee* v. *Lawrence*, 11 *Wall.* 36, 38, this court—following the previous cases of *Lawler* v. *Walker*, 14 *How.* 12, and *Railroad* v. *Rock*, 4 *Wall.* 177—said it was essential to our jurisdiction in re-examining the judgment of the State court that the alleged conflict between the State law and the Constitution of the United States "appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court," or "it must be that such a question was necessarily involved in the decision, and that the State court would not have given a judgment without deciding it." Later cases in this court have expressed the additional thought that if the highest court of the State assumes that the record sufficiently presents a question of Federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself to sustain the judgment, independently of any question of Federal right.

In the case before us, the Home for Incurables has not brought upon the record the fact that it asserted, in the State court, any Federal right

whatever. It is entirely consistent with the record that the Home did not, at any time pending the case in the State court, set up or claim any such right. If our jurisdiction is invoked on the ground that the judgment of the State court has denied a right, title, privilege or immunity secured by the Constitution of the United States, it is essential, under existing statutes, that such right, title, privilege or immunity shall have been specially set up or claimed in the State court. *R. S.* 709; *Armstrong* v. *Treas'r of Athens Co.*, 16 *Pet.* 281, 285; *Railroad* v. *Rock*, 4 *Wall.* 177, 180; *Powell* v. *Brunswick Co.*, 150 *U. S.* 433, 439; *Roby* v. *Colehour*, 146 *U. S.* 153, 159; *Oxley Stave Co.* v. *Butler Co.*, 166 *U. S.* 648, 654; *Levy* v. *Superior Court of San Francisco*, 167 *U. S.* 175, 177.

It is true that the transcript contains the certificate of the Chief Judge of the Court of Appeals of New York, not appearing to have been by order of that court while the case was before it or under its control, which states that the Home did make, in that court, the Federal questions now pressed upon our consideration. But that certificate is not properly a part of the record. While we have said in some cases that such a certificate is entitled to great respect, and, in other cases, that its office is to make that more certain and specific which is too general and indefinite in the record, it is insufficient in itself to give us jurisdiction, or to authorize us to determine Federal questions that do not appear, in any form, from the record, to have been brought to the attention of the State court. *Powell* v. *Brunswick Co.*, 150 *U. S.* 433, 439; *Newport Light Co.* v. *Newport*, 151 *U. S.* 527, 537; *Yazoo & Miss. R'd Co.* v. *Adams*, 180 *U. S.* 41, 47; *Felix* v. *Scharnweber*, 125 *U. S.* 54, 59.

Having no jurisdiction to re-examine the judgment below, the writ of error must be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.